92-1692

No. _____

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

City of Ely, a Minnesota corporation; Conservationists with Common Sense, Inc., a Minnesota not-for-profit corporation; F.B. Hubachek Corporation, Jr.; Wilderness Outfitters, Inc.,

Petitioners,

v.

Friends of the Boundary Waters Wilderness; Sierra Club; The Wilderness Society; Defenders of Wildlife; Wilderness Watch; Wilderness Inquiry; Minnesota Public Interest Research Group; Izaak Walton League of America, Inc., and
F. Dale Robertson, Chief of the United States Forest Service; Edward Madigan, Secretary of Agriculture,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a court interpret a statute which delegates authority to the Executive Branch in such a way as to deprive the Executive Branch of any discretion under the statute?

2. Does the term "feasible" have a fixed meaning in all environmental statutes irrespective of the text, context and legislative history of the term in a particular statute?

3. Should a court interpret a statute so as to work an unconstitutional taking of private property when an alternative interpretation is available which would save the statute from unconstitutionality?

PARTIES TO THE ACTION

All parties in the courts below are listed in the caption in this Court. Pursuant to Rule 29.1 of the Rules of this Court, Petitioners have no parent companies nor any non-wholly owned subsidiaries.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

City of Ely, a Minnesota corporation; Conservationists with Common Sense, Inc., a Minnesota not-for-profit corporation; F.B. Hubachek, Jr.; and Wilderness Outfitters, Inc., hereby petition this Court for summary reversal of the decision below or in the alternative for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND ORDERS BELOW

1. The opinion of the United States Court of Appeals for the Eighth Circuit, dated November 6, 1992, is published at 978 F.2d 1484 (8th Cir. 1992), and is reproduced in

Appendix A. The January 26, 1993, Order of the Court of Appeals denying rehearing and rehearing *en banc* is not yet reported, but is reproduced in Appendix C.

2. The opinion of the United States District Court for the District of Minnesota, dated August 1, 1991, is reported at 770 F. Supp. 1385 (D. Minn. 1991) and is reproduced in Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on Nov. 6, 1992. An order denying Petitioners' timely request for rehearing and rehearing *en banc* was entered on Jan. 26, 1993. This Court has jurisdiction pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case revolves around interpretation of the word "feasible" in Section 4 (g) of the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978), which is reproduced in Appendix D.

This case also involves the just compensation clause of the Fifth Amendment to the United States Constitution which provides that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V

STATEMENT OF THE CASE

The decision below calls for the closing of all motorized portages which have operated in the Boundary Waters Canoe Area Wilderness ("BWCAW") since early in this century, thereby impairing the public's ability to gain access to one of this county's largest wilderness areas. The court below substituted its own definition of "feasible" for that of the Chief of the Forest Service, holding as a matter of law that

"feasible" means possible. The court below also reversed the district court's deference to the agency's determination as being lawful and in accordance with the Boundary Waters Canoe Area Wilderness Act.

The BWCAW Act represents a balance struck between those who oppose all use of motorized vehicles in the wilderness area and those who support the continued, limited use of some motorized equipment to haul the boats to the lakes, such as motorboats on trucks.[1] The result of the statutory interpretation required by the court below is that this reasonable accommodation of competing interests fashioned by Congress and applied by an Executive agency is vitiated.

Moreover, the now profitable small businesses which serve the roughly 13,000 users of the Area via the motorized portages will also be destroyed as a result of the decision below. Some of those businesses, including Petitioner Wilderness Outfitters, have operated since the 1920s. These businesses represent vested private property rights, protected from being taken by government action without just compensation by the Fifth Amendment to the United States Constitution.

The Petitioners believe that summary reversal of the decision below is appropriate because the decision is so patently contrary to decisions of this Court and so fundamentally contrary to accepted principles of administrative law, other decisions of the Eighth Circuit and to the Constitution. If not, then certiorari is warranted in order to restore and maintain uniformity with decisions of this Court and other decisions of the Eighth Circuit and the Constitution.

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[1] This litigation, in fact, is nothing more than a thinly-disguised attempt to thwart the BWCAW Act which permits boats with small outboard motors on Trout Lake and parts of Basswood Lake. Closing the portages to motorized use will unquestionably have that effect.

A. Factual Background

The Boundary Waters Canoe Area Wilderness is the largest wilderness area in the eastern United States lying directly east of the Mississippi, in northern Minnesota, along the Canadian border. All of the BWCAW area lies within the Superior National Forest. The area consists of over one million acres of lakes, streams and forests. Over 1,000 of the lakes are larger than 10 acres, connected either by streams or "convenient portages that allow for easy canoe travel through the wilderness area." *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1316 (8th Cir. 1979)(*en banc*).

Underlying this case is a longstanding dispute between those who oppose all use of any motorized vehicles in the BWCAW and those who would allow some limited use of motorized vehicles in the Area. In 1978, Congress struck a balance between those two disparate interests by passage of the Boundary Waters Canoe Area Wilderness Act. Act of October 21, 1978, Pub. L. No. 95-495, 92 Stat. 1649. As a result of this compromise, most of the lakes in the BWCAW are reserved for canoe travel only. BWCAW Act § 4(i). However, motorboats are permitted on the largest lakes in the BWCAW. BWCAW Act § 4 (c). The three motorized portagess[2] which are the subject of this lawsuit service the two of the larger lakes which allow motor boats with a maximum of 35 h.p. motors.

The Trout Lake Portage (from Lake Vermilion to Trout Lake) and Prairie Portage (from Sucker Lake to Inlet Bay of Basswood Lake) are both approximately one-half mile long. The Four Mile Portage (from Fall Lake to Hoist Bay of Basswood Lake) is four miles long. All three portages are served by trucks which carry the motorboats, canoes,

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[2] A "portage" is a strip of land used to transport boats and canoes between two bodies of water. A "motorized portage" is one on which trucks are used to haul the boats, usually motorboats permitted by the BWCAW Act, and other equipment to the lakes.

passengers and their equipment such as bait, tackle, tents, food and supplies, on trailers across the portages to the lakes.[3] A number of small, family-owned outfitters rent equipment to the recreational users of the three lakes on which motorboats are allowed. Some of these outfitters or motorized portage operators also own small resorts which cater to the users of the lakes serviced by the motorized portages.

B. Proceedings Below

Management of the BWCAW is directly under the authority of the United States Forest Service. The decision of whether motorized portages should be continued in the BWCAW is delegated specifically to the Secretary of Agriculture. BWCAW Act §4(g). After a long administrative process in 1981, the Chief of the Forest Service determined that there was no feasible alternative to the motorized portages and therefore, in 1984 the Secretary did not close the portages. In 1986 the Forest Service completed a Land Resources Management Plan for the entire Superior National Forest. That plan authorized the continued use of motorized portages to cross the three portages in the BWCAW, based upon the Chief's earlier determination that it was not feasible to cross the portages without the use of motorized vehicles.

Shortly thereafter, the Respondents to this Petition administratively challenged this plan, arguing that it was "possible" to cross the portages carrying boats and equipment. As support for their position they introduced at the agency's informal hearing a videotape showing three obviously physically fit men manually carrying canoes across the two shorter portages[4] on two separate days, under optimum weather conditions. This, they argued, was

[3] Petitioner Wilderness Outfitters has operated a truck across the Four Mile Portage for nearly seventy years.

[4] The three men in the video tape did not attempt to cross the Four Mile Portage but instead chose an alternate route (from Fall Lake to Newton Lake, from Newton Lake to Pipestone Bay, and from Pipestone Bay to Back Bay on Basswood Lake).

proof that it was "feasible" to cross the portages with boats and equipment, thereby obviating any need for the motorized portages.

Following this administrative hearing, the Forest Service itself conducted another more extensive study regarding the feasibility of nonmotorized portages in the BWCAW. Their results showed that among the testers, all of whom were within the 80th - 90th percentile of physical conditioning, only three-quarters could successfully pass across the portages carrying their boats and equipment. Not only were the successful test participants not typical BWCAW users, but also "it [was] clear that the participants were very determined to succeed in the portaging, and a spirit of competition developed." Pet. App. at 60a. The participants worked at their maximum level during the tests and their effort was described by the test physiologists as similar to that seen in athletic performance by "varsity college athletes." Pet. App. at 61a & 62a. Because the typical BWCAW user is not a varsity athlete and the weather is not always sunny and portages are not always well maintained, the Chief worried that eliminating the motorized portages would threaten the health and safety of those who used the portages: "[A] wilderness, hours away from medical attention, is not the place to omit any sense of reasonableness from feasibility." Pet. App. at 59a. For all of these reasons, the Chief again concluded that while nonmotorized crossing of portages "[could] be done", *i.e.*, that it was possible as was argued by the plaintiffs, that "the task [was] not feasible" adding that "the risk to health and safety of portagers should be taken into account in determining "feasibility." *Id.* See copy of the Chief of the Forest Service's Report - Determination of nonfeasibility - BWCAW- attached as Appendix E.

Not satisfied with this result, the Respondents challenged the Chief's administrative decision in district court arguing once again that it was "possible" to cross the portages without the use of motorized vehicles. The district court deferred to the Chief's determination of "feasibility"

finding that it was neither arbitrary nor capricious and that it was consistent with the text and purpose of the BWCAW Act. Pet. App. B. A divided panel of the United States Court of Appeals for the Eight Circuit reversed the district court's decision, the majority holding as a matter of law that the word "feasible" means "physically possible." Pet. App. A. Judge Magill dissented. Pet. App. at 13a. He argued that the definition of "feasible" was not clear from the Act or its legislative history, and that the court must therefore defer to the Chief's construction of the Act so long as it is reasonable. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The government sought a rehearing and a rehearing *en banc*. That request was denied by the court below in a six to four decision (Pet. App. C).

REASONS FOR GRANTING THE WRIT

I. The Court Below Has Substituted Its Will For That Of Congress, Thereby Usurping The Authority Congress Delegated To The Secretary.

In 1978, by passage of the BWCAW Act, Congress effectuated a resolution of a battle which had been raging for years. Namely, whether motorized vehicles could be used in the BWCAW. The BWCAW Act reflects a compromise on this issue because it bans the use of motorboats and motorized portages throughout the Area except in a few, very specific locations. BWCAW Act §§ 4(i) and 4 (c). In fact, the BWCAW is the only wilderness area in the United States where motorized portages can be used.

Congress did not decide in 1978, however, that motorized portages would be necessarily permissible forever. Rather, Congress specifically delegated the authority to the Secretary to determine whether their use would be continued:

> Nothing in this Act shall be deemed to require the termination of the existing operation of

> motorized vehicles to assist in the transport of boats across the portages from Sucker Lake to Basswood Lake from Fall Lake to Basswood Lake, and from Lake Vermilion to Trout Lake, during the period ending January 1, 1984. Following said date, **unless the Secretary determines that there is no feasible nonmotorized means** of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above.

BWCAW § 4 (g) (emphasis supplied)

A. The decision below renders the term "feasible" meaningless because Congress knew in 1978 that it was "physically possible" for three athletes to carry their boats and equipment across the portages.

The Court below found that the term "feasible" was unambiguous and that its meaning was fixed as a matter of law to mean "possible." [5] Pet. App. at 12a. This statutory interpretation flies in the face of the statutory mandate that the Secretary utilize his expertise in wilderness management to determine the feasibility of nonmotorized portages. Since Congress knew in 1978 that it was physically "possible" for three athletes to carry their boats and equipment across the portages it must have intended that the Secretary do something more. Indeed, the court below quotes the self-

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[5] The court below relied principally upon the decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), for its holding that "feasible" means "possible" as a matter of law. *Overton Park* dealt with the routing of a highway around a park rather than through it. In that case, however, the term "feasible" is construed in the shadow of the term "prudent". So, even *Overton Park* does not support the standard that the court below adopted that "feasible" standing alone means "possible".

serving floor statement of Representative Burton who noted that it was physically possible to cross the portages without motorized vehicles adding that "[t]his method is feasible and proven. . ." Pet. App. at 10a.

Thus, Congress must have meant something more than physically "possible" when it decided to delegate the authority to the Secretary to determine whether it was "feasible" to allow the continued use of motorized portages. Otherwise, Congress simply would have stated that "all use of motorized portages will cease on January 1, 1984". There would have been no reason to delegate any decision-making authority had Congress already made the feasibility determination itself in 1978. Or, since Congress knew that it was physically possible to push manually a boat on wheels across the portages, Congress would simple have used the term "possible" instead of "feasible" if that is what it had intended.

By substituting its own definition of the term "feasible" for that of the agency, the court below far exceeds the role of acceptable judicial decision making. The only acceptable function of a court with respect to interpreting a statute is limited to ascertaining and effectuating its plain meaning. Ascertaining the plain meaning of a statute does not mean that whenever a statute is capable of several interpretations that the court is free to adopt its own definition.[6] As Judge Frankfurter once cogently observed, a statute is not "an opportunity for a judge to use words as 'empty vessels into which he can pour anything he will' -- his caprices, fixed notions, even statesmanlike beliefs in a particular policy." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 529 (1947); *see also Board of Governors of the Federal Reserve System v. Dimension*

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[6] Judge Magill noted in dissent and as any dictionary reveals, the plain meaning of the term "feasible" can range from "reasonably practicable" to "possible" or "obtainable." Pet.App. at 14a. The court below selected one of these meanings of "feasible" and gave no substantive rationale for its decision other than asserting that term was unambiguous.

Financial Corp., 474 U.S. 361 (1986); *Garcia v. United States,* 469 U.S. 70 (1984); *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980); and, *TVA v. Hill,* 437 U.S. 153 (1978). The court below completely abrogated the plain meaning rule and therefore its holding is wholly inconsistent with the teachings of this Court and with the BWCAW Act itself.

B. The decision below negates the entire delegation of authority by Congress for the Secretary to determine whether motorized portages should be continued.

More troublesome than the court's violation of the plain meaning rule is its failure to respect the constitutional integrity of the other two coordinate branches of the federal government. A fair reading of the 1978 BWCAW Act demonstrates that Congress delegated to the Executive, in the person of the Secretary of Agriculture, the responsibility to perform a discretionary act, *i.e.*, the determination of whether nonmotorized portages was feasible. BWCAW § 4 (g).

The court below did not hold that the Secretary's determination lacked substantive evidence or was otherwise an abuse of discretion, but instead found "as a matter of law" that the Secretary was entitled to make one determination only -- that nonmotorized portage was "feasible."

Such a Hobson's choice allows for no discretion whatsoever, reminiscent of Henry Ford's famous line: "You can have any color of car that you want, so long as it is

black."[7] By instructing the Secretary that the only statutorily permissible "choice" is a determination in favor of nonmotorized portages, the court below nullifies an entire provision of the 1978 BWCAW Act permitting the continuation of motorized portages "unless the Secretary determines that there is no feasible nonmotorized means. . ." BWCAW § 4 (g).

This judicial nullification of a valid statutory provision violates the fundamental principle of judicial noninterference except when statutory discretion has clearly been exceeded. *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). This is a serious trespass to the doctrine of separation of powers as it nullifies a congressional enactment by limiting the Secretary's discretion to a single choice dictated by the court. Turning this cardinal rule upon its head, the court below effectively makes the feasibility determination itself, by instructing the Secretary that he must administer the BWCAW pursuant to the court below's determination.

Congress intended that the Secretary, not the court below, ascertain the feasibility of nonmotorized portage. By plucking from the Secretary the responsibility which Congress entrusted, the court below has effectively

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[7] This point was strongly agrued to the court below in the government's Petition for Rehearing and Rehearing *en banc:* "[T]he majority erred when it decided that the Supreme Court has held that 'feasible' means 'possible' as a matter of law. Instead, the Supreme Court has held that in the context of particular statutes 'feasible' means possible from an engineering standpoint or possible from an economic or technolgocial standpoint. The Supreme Corut has never held that 'feasible' means 'possible' as a matter of law with no room for administative construction." Petition for Rehearing and Suggestion for Rehearing en banc on Behalf of Federal Appellees at 8-9. The government later added in its Petition: "While we do not contend that the Chief's discretion under the BWCAW Act is unbridled, the majority clearly erred when it held that the Act vested the Chief with almost no discretion." *Id.* at 9 n.2.

exercised the authority which Congress delegated to the Secretary. The result has far-reaching consequences in administrative law and points the way to permitting courts to avoid the application of *Chevron*.

II. This Court Should Determine Whether The Usual Rule Of Construction, That A Statute Should Be Construed So As To Be Constitutional, Applies To Uncompensated Takings Under The Fifth Amendment.

A cardinal and long standing principle of statutory construction is that a statute should be construed in a way that makes it constitutional. *See, e.g., Rescue Army v. Municipal Court*, 331 U.S. 549 (1947) and *Cohens v. Virginia*, 6 Wheat. 264, 441 (1821). This principle is based on the understanding that when a statute is subject to a range of interpretations, courts should not seek to invalidate a statute on constitutional grounds when another equally valid interpretation would survive constitutional scrutiny. The rule reflects an understanding that the legislature would not have enacted legislation which would be struck down as unconstitutional. *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-74 (1947). However, despite this longstanding rule of statutory construction, the court below rushed in to adopt an interpretation that rendered the statute unconstitutional.

The Fifth Amendment is a unique provision in the Constitution, serving as the only express guarantee for money damages for the taking of private property. *Armstrong v. United States*, 364 U.S. 40 (1960). This Court has further held that the Fifth Amendment obligation for just compensation is so evident that an aggrieved property owner need not look to a statute or other legislative authorization in order to obtain the remedy of just compensation to which he may be entitled. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *United States v. Clark*, 445 U.S. 253, 257 (1980). Given the uniqueness of the Fifth Amendment,

the question which this case raises is whether an interpretation of a statute which renders it an unconstitutional taking of property is a violation of the usual rule of statutory construction.

The motorized portages business interests[8] in this case are clearly recognized property rights protected against an uncompensated taking under the Fifth Amendment. This Court itself has defined "property" as "an expectation based on rules or understandings." *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979); *see also Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992) and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). In *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990), *reh'g denied*, 1191 U.S. App. LEXIS 1955 (Fed. Cir. 1991), the court held that a quarantine imposed by the United States Department of Agriculture which had wiped out a turkey breeder stock business was a taking in violation of the Fifth Amendment.

In *Ruckelshaus v. Monsanto Co.*, *supra*, this Court held that with respect to challenging the validity of a statute, a property owner cannot directly seek invalidation when compensation is an available remedy (a property owner may not seek to enjoin application of a statute under the Fifth Amendment because compensation is available as a remedy for a taking). However, the Petitioners do not believe that *Monsanto* stands for the proposition applied by

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[8] There is a thriving industry outside of the BWCAW which serves the recreational users of the Area and which is contingent upon the continued use of motorized portages. The businesses relate directly to the "feasibility" of motorized portages in the BWCAW. For example, there are three businesses which operate trucks across the three portages (including Petitioner Wilderness Outfitters) to carry recreational users and their boats or canoes and equipment to the three lakes which allow motorboats. There is also a host of other businesses which are indirectly related to the "feasibility" of motorized portages such as outfitters who provide bait, food, ice and other equipment to the recreation users whose use of the BWCAW depends upon access via motorized portages. There are also small resorts whose existence largely depends upon access via motorized portages.

the court below, that a court may freely select from a range of acceptable statutory interpretations the one alternative that results in the unconstitutional taking of private property, simply because the property owner can always seek compensation for the taking. That position runs contrary to the usual rule of statutory construction that statutes be construed so as to be constitutional and it is bad policy because it increases the risk of government incurring liability for unanticipated unconstitutional takings of private property.

The BWCAW Act is capable of being construed in a manner which does not result in a taking of private property in violation of the Fifth Amendment. The agency charged with construing the Act did so for almost a decade. That statutory construction was upheld by the district court as lawful and within the meaning of the BWCAW Act. However, the construction of the Act compelled by the court below, a radical departure from the entire modern history of the use of this Area, will lead to the unconstitutional taking of private property, an outcome for which there is no clear intent by Congress to achieve nor for which there is any clear justification in the Act. The Fifth Amendment should serve a guide in determining what is an acceptable statutory construction as does every other provision in the Constitution.

CONCLUSION

For the foregoing reasons, the decision below should be summarily reversed or in the alternative, the Petition should be granted and this case set for plenary consideration.

Respectfully submitted,

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April 26, 1993

APPENDIX

APPENDIX

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APPENDIX A

FRIENDS OF THE BOUNDARY WATERS WILDERNESS; Sierra Club; The Wilderness Society; Defenders of Wildlife; Wilderness Watch; Wilderness Inquiry; Minnesota Public Interest Research Group; Izaak Walton League of America, Inc., Appellants,

v.

F. Dale ROBERTSON, Chief of the United States Forest Service; Edward Madigan, Secretary of Agriculture, Appellees,

City of Ely, a Minnesota corporation; Conservationists With Common Sense, Inc., a Minnesota not-for-profit corporation; F.B. Hubachek, Jr.; Wilderness Outfitters, Inc. Intervenors-Appellees.

No. 91-3032

United States Court of Appeals,Eighth Circuit

Submitted May 13, 1992.

Decided Nov. 6, 1992.

Rehear Rehearing En Banc

Denied Jan. 26, 1993.

Nonprofit organizations sought declaration that chief of United State Forest Service and Secretary of Agriculture acted illegally in allowing continued operation of motorized portaging and sought permanent injunction. The United States District Court for the District of Minnesota, James M. Rosenbaum, J., 770 F.Supp 1386, ordered that motorized portaging would not be prohibited. Appeal was taken. The

Court of Appeals, John R. Gibbon, Circuit Judge, held that "feasible" within meaning of Boundary Waters Canoe Area Wilderness Act meant capable of being done or physically possible that motorized portaging between lakes could not continue under statute requiring termination of motorized portaging unless no "feasible" means of transporting boats existed, after test showed most teams of three people could successfully complete nonmotorized portaging.

Order reversed.

Magill, Circuit Judge, filed dissenting opinion.

Brian B. O'Neill, Minneapolis, Minn., argued (Richard Duncan and Sandi Zellmar, on the brief) for appellants.

Peter A. Appell, Dept. of Justice, Washington, D.C. argued (Robert Klarquist, Dept. of Justice, Washington D.C., Robert Small, Asst. U.S. Atty., Minneapolis, Minn., on the brief), for appellees.

Before McMILLIAN, JOHN R. GIBSON, and MAGILL, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Whether there should be motorized portages in the Boundary Waters Canoe Area Wilderness is the issue before us in this case. The district court refused to enjoin the motorized portages, and the Friends of Boundary Waters Wilderness and seven other groups[1] appeal. The central issue in the appeal boils down to the interpretation of the word "feasible" contained in Section 4(g) in the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978). The district court upheld the Chief of the United States Forest Service's decision allowing the

[1] Sierra Club; the Wilderness Society ; Defenders of Wildlife; Wilderness Watch; Wilderness Inquiry; Minnesota Public Interest Research Group; and Izaak Walton League of America, Inc.

motorized transportation of boats across the portages because no feasible alternative existed, 770 F.Supp. 1385. We are convinced the district court erred in its interpretation of the statue, particularly, the word "feasible," and we reverse.

The Boundary Waters Canoe Area Wilderness, in northeastern Minnesota, consists of some 1,075,500 acres of stream lakes, and forests.[2] This case in three portages in the Boundary Waters Canoe Area Wilderness: Prairie Portage, Four Mile Portage, and Trout Lake Portage. For some time, trucks have been used to carry boats across the portages. The Boundary Waters Canoe Wild Area Act, however, limits the continuation of this practice. Section 4(g) of the provides:

> Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to as the transport of boats across the [Prairie Portage, Four Mile Portage, and Trout Lake Portage] during the period ending January 1, 1984. Following said date, unless the Secretary determines that there is no feasible nonmotorized means of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above.

The Secretary did not close the motorized portages in 1984. In 1986, the local Forest Service staff completed a Land Resource Management Plan for the Superior National Forest (the Boundary Waters Canoe Area lies wholly within the Superior National Forest). *See* 16 U.S.C. § 1604 (1988). The Plan authorized the continued motorized operation of the Prairie, Trout Lake, and Four Mile portages. The Plan concluded that these three portages should remain open because it was not feasible to use nonmotorized portage wheels to cross the portages. The Forest Service based this

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[2] We described this area in *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1316 (8th Cir. 1974) (*en banc*).

conclusion on a 1981 test in which three men unsuccessfully attempted to cross Prairie Portage using portage wheels.

The Friends administratively appealed the decision to continue to allow motorized portages. The Friends submitted a videotape and pictures showing three men traversing all three of the portages at issue using portage wheels.

On March 10, 1989, the Chief of the Forest Service issued his decision on the administrative appeal. He observed that the Regional Forester's 1981 study determined only that it was not feasible to use nonmotorized means to cross the Prairie Portage, and that no finding was made about the Four Mile or Trout Lake portages. The Chief concluded that "feasible" means "possible," not "ideal" or "most practical." The Chief directed the closing of the Four Mile and Trout Lake portages and ordered a study to test the feasibility of nonmotorized portaging for the Four Mile, Trout, and Prairie portages. The Chief observed that "[i}f a determination is made that it is feasible to use nonmotorized means to cross a portage, that portage must be closed."

Six days later, however, the Chief issued a memorandum delaying the closure of the portages pending the feasibility study. The Friends claim that this change of mind was due to a telephone call from Representative Jim Oberstar. The Chief admitted that Oberstar telephoned and informed him that his constituents were unhappy with the Forest Service's decision, but claims that Oberstar did not ask him to change his ultimate decision on the issue--only to discuss his concerns with the interested parties.

In July and September 1989, the Forest Service conducted a feasibility study considering nonmotorized portaging. The Forest Service organized one, two, and three person teams of various ages and genders, using fishing boats with equipment loads of different weights. The field testers successfully completed twenty-six out of thirty-four attempts, and most all of the three-person teams successfully completed the portages.

After considering the test results Chief determined that although portaging by nonmotorized means "[could] be . . . the task [was] not feasible." The Chief concluded that "the risk to health and safety of portages should be taken into count in determining "feasibility.'" Relying on a study performed by three physiologists who concluded that it was physically dangerous for persons to attempt nonmotorized portages, Accordingly, the Chief concluded it was not "feasible" to attempt nonmotorized portages. Accordingly, the Chief ruled that all three motorized portages should remain open indefinitely. The district court affirmed the Chief's decision and this appeal followed.

I.

The Friends argue that the Chief's decision leaving open the three motorized portages constitutes agency action "not in accordance with law." 5 U.S.C. § 706(2) (A) (1988). They contend that the Chief's decision violates the Boundary Waters Canoe Area Wilderness Act and the Wilder Act, 16 U.S.C. §§ 1131-1136 (1988). They argue that as a matter of law, "feasible means "possible" and, therefore, the district court erred in failing to enjoin this violation of law.

The Supreme Court set forth our standard for reviewing agency action in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43, 104 S.Ct. at 2781. If the statute is silent or ambiguous, we may only review the agency's action to determine whether that action "is based on a permissible construction of the statute." *Id* at 843,104 S.Ct. at 2782. This court recently set forth the inquiry required by *Chevron*, in *Emerson v. Steffen*, 959 F.2d 119, 121 (8th Cir.1992).

Both parties suggest that the statute is unambiguous, and that the intent of Congress was clear. On the one hand, the Friends say that Congress intended "feasible" to mean "possible," and the Chief violated Congress' express intent by closing the motorized portages in light of the test results. The Chief and intervenors[3] respond that Congress intended that "feasible" meant "reasonable," "practicable" or "likely," and that the Chief, therefore, complied with the expressed intent of Congress in continuing to allow motorized portaging. Their fall-back position is that to the extent that the statute is ambiguous the Chief's decision is based on a "permissible construction" of the Act, which is not arbitrary, capricious, or contrary to law, and therefore, must be upheld. 5 U.S.C. § 706(2)(A).

The Friends say that the Boundary Waters Canoe Area Wilderness Act, legislative history of the Act, Supreme Court precedent, and agency precedent conclusively establish that "feasible" means "physically possible." For support, the Friends direct us to the Supreme Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). In that case, the Supreme Court considered language contained in the Department of Transportation Act and Federal-Aid Highway Act which directed the Secretary not to "'approve any program or project' [which] requires the use of any public parkland `unless (1) there is no feasible and prudent alternative to the use of such land....'" *Id* at 411, 91 S.Ct. at 821 (citations omitted). The Supreme Court observed "the requirement that there be no `feasible' alternative route admits of little administrative discretion For this exemption to apply the Secretary; must find that as a matter of sound engineering it would not be feasible to build the highway along any other route." Id (footnote omitted).

The Chief and intervenors contend that "feasible" does

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[3] The intervenors include the City of Ely, Minnesota; Conservationists with Common Sense; Wilderness Outfitters, Inc.,; and F. B. Hubachek, Jr.

not mean "physically possible," and that *Citizens to Preserve Overton Park*, is not on point. Pointing to Webster's Third New International Dictionary, 831 (3d ed.1967), they argue that feasible means "reasonably possible' "practicable," and that it is not "reasonably possible" or "practicable" to push a 16 foot, 25 horsepower boat and gear across the portages.

In considering the definition of "feasible," we observe the purposes behind the Boundary Waters Canoe Area Wilderness and the Wilderness Acts. The Boundary Waters Canoe Area Wilderness Act includes as its purposes that of preventing: "further road and commercial development and restor[ing] natural conditions to existing temporary roads in the wilderness." BWCAWA § 2(5). Although some motorboats are allowed on the lakes in issue, it is evident that congressional intent was to discourage motorized uses.

The Wilderness Act defines "wilderness":

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvement or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c).

Prohibiting motorized portages, unless it is not "physically possible" to do so, is entirely consistent with the purposes announced in these Acts, and we are persuaded that the Chiefs definition of "feasible" was overly restrictive and contrary to clear congressional intent and the plain meaning of the word "feasible". *Chevron,* 467 U.S. at 843, n. 9, 104 S.Ct. at 2782, n. 9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

In addition to the definition of feasible set forth in *Citizens to Preserve Overton Park* the Supreme Court defined "feasible" in *American Textile Manufacturers Institute, Inc., v. Donovan,* 452 U.S. 490, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981). In *Donovan,* the Supreme Court addressed the definition of "feasible" in Section 6(b)(5) of the Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5) (1982). 452 U.S. at 508, 101 S.Ct. at 2490. The Court rejected the argument that a determination of "feasibility" required a cost benefit analysis, and concluded that feasible meant "`capable of being done, executed, or effected."' *Id* at 508-09, 101 S.Ct. at 2490 (quoting Webster's Third New International Dictionary of the English Language 831 (1976)). *Accord Asarco, Inc. v. Occupational Safety & Health Admin.,* 746 F.2d 483, 495-96 (9th Cir.1984).

We think it evident that "Congress has directly spoken to the precise question" at issue. *Chevron,* 467 U.S. at 842, 104 S.Ct. at 2781. Section 4(g) requires termination of motorized use of the portages unless the Secretary determines that there is no feasible motorized means of transporting boats across the portages. The feasibility test is simply an exception to a clearly expressed mandate. As discussed above, the Supreme Court has considered the definition of the word "feasible" on two occasions. The addition of the term "sound engineering," incorporated in *Citizens to Preserve Overton Park* does not redefine "feasible" to include "reasonably possible." Indeed the word

"prudent" in the statute in *Citizens to Preserve Overton Park*, 401 U.' 411, 91 S.Ct. at 821, gave the agency substantially more leeway than the Forest Service had under section 4(g). Nevertheless the Supreme Court concluded in that case that the agency had "little administrative discretion." *Id* Thus, in light of the test results, the Forest Service had even less administrative discretion than the agency did in *Citizens to Preserve Overton Park*. The Chief's decision, as effectuated by district court's ruling, as well as the dissent, reads into the statute an ambiguity which does not exist. In applying the clearly expressed intent of Congress, can only conclude that "feasible" means "capable of being done" or "physically possible," and as a matter of law, the Chief erred in ordering that the portages remain open.

Because we conclude that the statue is clear, we need not concern ourselves with the Act's legislative history. We note however, that the Act's legislative history supports the Friends' interpretation of word-feasible. The legislative history reveals a long-standing dispute between motorized and non-motorized uses in Boundary Waters Canoe Wilderness Area. House Bill H.R. 12250 would have terminated all motorized portages. 124 Cong. Rec. S17,890 (daily ed. Oct. 9, 1978). During congressional deliberations, Senate Subcommittee Chair James Abourezk directed the opposing parties to compromise on several key issues, including portages. *Id.* at S17,889 (Statement of Sen. Wendell Anderson). The parties met and negotiated a compromise known as the "Dayton Walls" compromise. *Id.* This compromise, instead of banning all portages as set forth in the House Bill, permitted two mechanized portages to exist indefinitely BWCAW § 4(d), and proposed the "feasible means" test for the other three portages in issue. 124 Cong.Rec. S17,889 (daily Oct. 9, 1978). Representative Phillip Burton, manager of the House Conference Committee explained:

> The final bill requires that the Secretary is to terminate all motorized use the Prairie Portage from Sucker Lake to Basswood Lake, the Four Mile Portage

from Fall Lake to Basswood Lake, the Trout Lake Portage from Lake Vermillion to Trout Lake on January 1, 1984, unless "no feasible nonmotorized means of transporting boats" between the lakes previously served by these portages is available.

I understand that feasible methods of transporting such boats in fact are already in use in the BWCA. I understand that during the compromise discussions it was agreed that "feasible" meant a method involving two able-bodied resort guests and one able-bodied guide.

The compromise agreement simply requires that there be a feasible nonmotorized method of moving boats with motors no larger than 25 horsepower between the lakes in question, using three able bodied adults. It does not require that the portage routes be the same ones now traversed by trucks.

For example, the Fourmile Portage truck trail from Fall Lake to Basswood Lake could be replaced by portaging through Newton Lake to Pipestone Bay of Basswood, and then from Pipestone Bay to Back Bay to reach the specific areas now served by the Fourmile Portage. Such a route already exists, and the portages involved are suitable for nonmotorized transport of such boats.

In fact, the Forest Service has allowed only nonmotorized transport of boats from Fall Lake to Basswood via the Newton Lake-Pipestone Bay route for several years now. The method often used for larger boats is to strap or otherwise attach a carriage with bicycle wheels beneath one end of the boat and then simply wheel the boat across the portage--like a wheelbarrow--with motor and fishing gear, gas cans, et cetera inside the boat. This method is feasible and proven, and I would expect that the Secretary will terminate motorized use of these portages and permit that method to be used.

> Some people have suggested using rollers or a hand-operated tram-on rails, but those methods require permanent structures and mechanical equipment within the wilderness. Such developments are inappropriate. Following termination of motorized used in 1984, I expect the Secretary to obliterate unused truck trails, remove any docks, and otherwise eliminate as nearly possible any evidence of man's works.

124 Cong.Rec. H13,438 (daily ed. Oct. 14 1978).

The Chief argues that Representative Burton's statement is of no help because the statute itself is unambiguous, and the most authoritative source for determining congressional intent lies in the Con. Report. The Chief says that Burton's statement is at odds with the Committee Report and, therefore, cannot be given any weight. *Shell Oil Co. v. Iowa Dep't of Revenue,* 488 U.S. 19, 29, 109 S.C 283-84, 102 L.Ed.2d 186 (1988). The Chief cites a statement in the Committee Report which explains that a compromise was reached to "afford increased protection of the area's wilderness character while allowing the continuation of the most heavily used and long established motorized uses." S. Rep. No. 95-1327, 95th Cong., 2d Sess. 295-96 (1978). The Chief and the intervenors suggest that the Friends' true goal is to do away with outboard motors on Basswood and Trout Lakes despite Congress' express authorization allowing motorboats on these lakes. They point out that prohibiting motorized portages will prevent people, particularly older people, from enjoying the area.

Although we need not consider Burton's statement as dispositive, we note that his statement is consistent with our interpretation of "feasible." *See Brock v. Pierce County,* 476 U.S. 253, 263, 106 S.Ct. 1834, 1840, 90 L.Ed.2d 248 (1986). When the entire Committee Report is read, it is obvious that the passage the intervenors point to concerns snowmobile use, and has absolutely nothing to do with motorized portages. We think the compromise, permitting motorized uses on two of the portages and incorporating the

feasibility test for the other three portages, reflects a clear congressional intent to ban motorized portages unless it was physically impossible to transport boats to lakes served by the portages.

We reverse the district court order.

MAGILL, Circuit Judge, dissenting.

Because I find that the statute here is far from clear and the Chief's decision constitutes a reasonable interpretation of the congressional mandate, I respectfully dissent.

The facts are adequately set out in the majority opinion. Review of agency interpretations of statutes requires courts to apply the two-pronged test set forth in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The majority sets out the proper standard:

> We must first determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' If the statute is silent or ambiguous, we may only review the agency's action to determine whether that action `is based on a permissible construction of the statute.'

Maj. op. at 1486 (citing *Chevron,* 467 U.S. at 842-43, 104 S.Ct. at 2781).

The majority fails, however, in its application of this standard. The court's charge under prong one of *Chevron* is to interpret the language of the statute and deter nine congressional intent, using the traditional tools of statutory interpretation. *Chevron,* 467 U.S. at 843 n. 9,104 S.Ct. at 2782 n. 9. According to the Supreme Court, statutory interpretation begins with examination of the statutory text. *See, e.g., United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989). If that text is clear, resort even to legislative history is unnecessary. *Id.*

Here, then, the question under prong one of *Chevron* should be whether Congress clearly intended that feasible nonmotorized means meant any "physically possible"

alternative means. I contend that a fair reading of the statutory text and legislative history demonstrate it did not.

Section 4(g) of the Boundary Water Canoe Area Wilderness Act provides:

> Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to assist in the transportation of boats across the [Prairie Portage, Four Mile Portage, and Trout Lake Portage] during the period ending January 1, 1984. Following said date, *unless the Secretary determines that there is no feasible nonmotorized means of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above.*

Boundary Waters Canoe Area Wilderness Act of 1978, Pub.L. 95-495, § 4(g), 91 Stat. 1649, 1651 (1978) (emphasis added). This court recognizes, correctly, that "feasible" can support the meanings proffered both appellants and appellees.[1] It then proceeds to hold that § 4(g) demonstrates on its face, without resort to legislative history, a clear congressional intent that feasible means physically possible.

To reach this conclusion, the court accepts appellant's contention that "feasible" is a term of art with a commonly accepted meaning in environmental statutes, and that Congress intended that meaning in § 4(g). Courts often look to other statues as a guide to statutory meaning. Such

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[1] Commentators have suggested that "feasible" is a term Congress often uses to grant administrative discretion. *See, e.g.*, Laurence H. Silberman, Chevron - *The Intersection of Law and Policy*, 58 Geo.Wash.L.Rev. 821, 823, 825 (1991) ("Finding a specific congressional intent is particularly unlikely if the agency is applying statutory language that calls for administrative judgment, such as what is 'feasible' or 'probable.'")' Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv.L.Rev. 405, 419 (1990).

inquiry, however, is always an effort to determine congressional intent. Here, it appears that the court has blindly adopted the definition of "feasible" from other statutes without considering whether Congress intended to adopt that definition.

First, the court provides no evidence from either the statutory text or the legislative history to suggest that Congress adopted the definition of "feasible" in other statutes into § 4(g). Thorough inquiry convinces me that none exists.[2] Moreover, the statutes cited as establishing the "accepted" definition of feasible are inapposite. They all deal with engineering or technological capabilities, while § 4(g) requires the Forest Service to determine whether human beings have the physical capacity to traverse the portages in question. Because the statutes do not concern analogous subjects, there is no reason to believe, without some specific indication, that Congress adopted such an inapt definition.

Without the inapt definition of "feasible" imported from other statutes, § 4(g) does not directly answer how the Forest Service is to determine the feasibility of alternative means. Because I find the plain language of the statute ambiguous, I must examine the legislative history. It likewise provides little help.

As noted above, I find no legislative history explicitly considering whether Congress used feasible to mean "physically possible." There exists, however, some history concerning the "feasibility" of portage wheels. Appellants, and this court, cite at length from the floor statements of Rep. Burton, the House sponsor. Rep. Burton stated, after conference, that, inter alia, "feasible non-motorized means"

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[2] While the floor statements of Rep. Burton suggest that the Forest Service should consider portage wheels to be presumptively "feasible" means, he says nothing specifically about whether Congress adopted the definition of "feasible" from other environmental statutes. Moreover, there are persuasive reasons to distrust Rep. Burton's statements concerning congressional intent.

existed at the time of the bill's consideration. Speaking about portage wheels, he stated: "This method is feasible and proven, and I would expect that the Secretary will terminate motorized use of these portages and permit that method to be used." 124 Cong. Rec. HI3,438 (daily ed. Oct. 14, 1978).

There are two reasons to be wary statement. First, it is the statement who, while not a dissenter, did not get what he wanted in the revised bill after conference. The bill championed by Rep. Burton and passed by the House would have closed all motorized portages immediately. It appears that Rep. Burton attempted to write into the legislative history what he could not write into the law. *See In re Sinclair,* 870 F.2d 1340 (7th Cir.1989) (Easterbrook, J.). Second, the compromise reached suggests that Congress did not believe feasible means, as defined in § 4(g), existed in 1978. Rep. Burton's statements seem to imply that the statutory deal simply provided a six-year phase out period for the four named portages. But if that is what Congress intended, they much more easily could have stated that "as of January 1, 1984, the following portages shall terminate." Instead, Congress directed an executive agency to interpret an ambiguous statutory term and to determine at the end of the six-year period whether the portages should remain open. In the face of such evidence, we would be blind to the realities of the legislative process if we took Rep. Burton's words to be an objective, unbiased statement of the Congress' intent in enacting § 4(g).

Because neither the statutory text nor the legislative history provides credible evidence of a clear legislative intent concerning the definition of the term "feasible," I must reach prong two of *Chevron:* "whether the agency's answer is based upon a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782. In prong two, courts properly consider whether the agency's action or interpretation is reasonable in view of the statute's purposes. In this case, we must measure the Forest Service's decision in that context.

The court correctly recognizes that one of Congress' overarching goals in enacting the BWCAW Act was to discourage motorized use. In assessing the feasibility of alternative nonmotorized means, the Chief recognized, however, that Congress intended motorized use to *continue* on the lakes serviced by the portages in question. Senator Wendell Anderson of Minnesota stated:

> The bill passed by the House attempted to give wilderness protection to this unique area while still providing for a continuation of limited motorized use. This area is a prized area for sports enthusiasts and fishermen of all kinds. Many small resorts have flourished surrounding these beautiful lakes. In order to protect these businesses and to continue to allow sport fishermen to fish these prize trout and walleye lakes, I have worked to amend the House version of this bill to provide motorized use on a greater number of lakes. In almost every case lakes necessary for a resort to maintain its business have been kept open for the use of small motors.

Statement of Senator Wendell Anderson, 124 Cong.Rec. S.17889 (daily ed. Oct. 9, 1978). Thus, we must balance these contradictory intentions. I believe that absent more, the specific must trump the general. The legislative intent to allow motorized use on the lakes serviced by these portages belies a congressional desire to place limits upon access to those lakes that would exclude many who were using them at the time the law was passed.

When viewed in this context, the Chief's decision that no feasible nonmotorized means existed is reasonable and consistent with the statute. First, the tests the Forest Service conducted were consistent with the statute. Recognizing the congressional desire to continue motorized use on these lakes, the Forest Service attempted to determine the average user of these portages, and to tailor its tests to mirror that use. Portage Report at 5-7; Determination of Feasibility for Three Motorized Portages Within the Boundary Waters

Canoe Area Wilderness, Oct. 11, 1989, (hereinafter Determination) at 2. The Forest Service attempted to determine whether feasible means other than portage wheels existed; however, appellants insisted that only portage wheels be tested. Determination at 2. It also considered the use of alternative routes for some of the portages, but discovered that other provisions of the Act prohibited such use. Determination at 4.[3]

The Chiefs conclusion following these tests, that no feasible nonmotorized means existed, is likewise reasonable and consistent with the statute. Although 76% of those who attempted the portages during the test completed them successfully, the Chief determined that they exerted significantly more effort than the average portage user because of the media coverage and the air of competition surrounding the tests. Determination at 4-5. A physiological study determined that the test participants, who tested considerably above the national average for cardiovascular fitness, worked to near physical capacity in completing the portages. Determination 4-5. The physiologist who reviewed the tests stated that:

> The manual portaging of these boats on the available portage wheels is a task that required high levels of sustained physical effort and, in the case of the Four Mile Portage, marathon-like endurance performance. The data suggests that the level of effort and endurance required would not normally be achievable by people who are in "normal" physical condition for their age and gender. The excellent physical condition of subjects tested contributed highly their ability to complete the required tasks.

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[3] The BWCAW Act put limits on motorized use on the lakes where it was still allowed. The alternative routes appellants suggested for the Four Mile Portage would not be feasible because, as the Chief found, "motorized use of Newton Lake and Pipestone Bay would exceed the quota limits established in the BWCA Wilderness Act if use from the Four Mile Portage were diverted to this area." Determination at 4.

Portage Report, App. G; Determination at 4-5. Based upon congressional intent continue motorized use of these lakes was reasonable for the Chief to consider the physical effects on people in "normal" physical condition when making his decision.

The feasibility report submitted to the Chief noted other safety concerns that support the reasonableness of his decision. The report concluded that the test provided a somewhat idealized situation. Many using portage wheels would not have the same training or take the same safety precautions as the test participants. Those using the portages may have spent several days in the Boundary Waters and may be fatigued or dehydrated and thus more susceptible to injury. Portage Report at 21. The tests also did not approximate the normal use of the portages, in which people pass each other and must keep adequate distance between boats. *Id* Finally, the report raised concerns about the condition of the portages deteriorating and leading to safety problems once motorized use ceased. *Id* at 21; Determination at 3. The Chief reasonably considered the impact of normal use of the portages, and not just the results from an idealized test situation, in making his decision.

Appellants challenge the Chief's consideration of safety concerns in making his determination, contending that the statutory term "feasible" does not allow such considerations. For this proposition, appellants cite the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). In *Overton Park*, the Court held that the Secretary could not engage in a wide ranging balancing of factors, including safety considerations, to conclude whether another highway route was "prudent." This reliance is inapposite. First, *Overton Park* does not stand for the proposition that safety considerations were irrelevant to the decision involved therein. It would border on ridiculous to suggest that the safety of those using a highway could not be considered in determining, as the Court required, whether use of a

particular highway route is "feasible" as a "matter of sound engineering." The Court merely intended that the Secretary not engage in ad hoc balancing of the relative merits of the particular routes.

Moreover, *Overton Park* is irrelevant to this situation. The choice of an alternative route for a highway will create no specific safety concerns independent of those subsumed in an analysis of sound engineering practice. That is not true in this case. The level of physical exertion required to complete these portages directly relates to the health and safety of those using them. In light of congressional intent to keep lakes open for use by sports fishermen using motorboats, it is imminently reasonable for the administrative decisionmaker to consider the effect on the health of the people likely to be affected. "Feasibility," in light of all the circumstances, should not be construed to create an unreasonable risk for those who Congress intended could continue to use the lakes in question.

Because Congress did not explicitly define "feasible nonmotorized means," I would defer to the Forest Service's reasonable decision. This conclusion does not imply a lack of respect for the legislative branch; instead, I believe it fosters respect. If Congress clearly directs, we judges will follow. Here, however, it appears that Congress decided not to decide the status of these portages, and left that decision to the agency. By deferring to the agency, we respect that congressional decision. Moreover, by leaving policy decisions to the politically accountable agencies rather than the judiciary, we foster democratic accountability. I respectfully dissent.

APPENDIX B

FRIENDS OF THE BOUNDARY WATERS WILDERNESS, et al., Plaintiffs,

v.

F. Dale ROBERTSON, et al., Defendants,

and

City of Ely, et al., Intervenors-Defendants.

Civ. No. 4-90-8.

United States District Court,
D. Minnesota
Fourth Division.

Aug. 1, 1991.

Nonprofit organizations sought declaration that chief of government forest service and secretary of agriculture acted illegally in allowing continued operation of motorized portages and sought permanent injunction to bar continued operation of portages. The District Court, Rosenbaum, J., held that it was not "feasible" within the meaning of the Boundary Waters Canoe Area Wilderness Act to transport boats using nonmotorized portage wheels and thus operation of motorized portages would not be prohibited.

Ordered accordingly.

Woods and Forests

It was not "feasible" within meaning of Boundary Waters Canoe Area Wilderness Act to use nonmotorized portage wheels to transport boats to lake, and, thus, operation of motorized portages was not prohibited; term "feasible" did not mean merely possible but was more properly thought of as reasonably convenient or usable. 5

U.S.C.A. § 701 et seq.; 28 U.S.C.A. §§ 1331, 1361, 2201, 2412.

See publication Words and Phrases for other judicial constructions and definitions.

Richard A. Duncan, Brian B. O'Neill, Andrea M. Fike, Faegre & Benson, Minneapolis, for plaintiffs.

Allan D. Brock, U.S. Dept. of Justice, Environment & Natural Resources Washington, D.C., and Robert M. Small, Asst. U.S. Atty., Minneapolis, Minn., defendants Robertson and Madigan.

Kent Robert Holmberg, Defenbaugh Law Offices, Ely, Minn., for intervenor City of Ely and Conservationists with Common Sense, Inc.

Bennett A. Webster, Gamble & Davis Des Moines, Iowa, and James C. Ohly, Doherty, Rumble & Butler, Minneapolis Minn., for intervenors Wilderness Outfitters, Inc., and Hubachek.

ORDER

ROSENBAUM, District Judge.

How to protect; how to preserve; how to access wilderness? What and whose values are embodied in the concept of wilderness?

This matter is before the Court on cross motions for partial summary judgment. The immediate issue is whether there is an alternative to motorized portages at three locations in the Boundary Waters Canoe Area Wilderness (Boundary Waters BWCAW). The parties agree that this portion of the action is ripe for summary judgment.[1] The Court concurs

[1] A companion portion of this suit has been temporarily resolved and is not germane to this motion.

in this view.

Plaintiffs bring this action for declaratory and injunctive relief and for judicial review of final agency action under the Administrative Procedure Act (APA), 5 U.S.C. § 701, et seq. Jurisdiction is properly based upon 28 U.S.C. §§ 1331,1361, and 2201.

By this motion, plaintiffs seek two forms of relief. They first request a declaration that defendants have acted illegally in allowing the continued operation of three motorized portages in the BWCAW and in permitting the existence of permanent structures within the BWCAW. Second, plaintiffs seek a permanent injunction barring the continued operation of those motorized portages and directing defendants to ensure elimination of permanent structures from the BWCAW. Plaintiffs also seek attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

The plaintiffs are non-profit organizations which claim an interest in protecting, preserving, and enjoying the nation's wilderness areas, and the Boundary Waters in particular. The BWCAW, established in 1978, is a wilderness area of more than one million acres within the larger Superior National Forest in northern Minnesota.

Defendant F. Dale Robertson is the Chief of the United States Forest Service (Chief) and defendant Edward Madigan is the Secretary of Agriculture (Secretary)[2] Defendants are responsible for formulating and implementing management plans for the Superior National Forest. Intervenors City of Ely, Conservationists with Common Sense, Inc., Wilderness Outfitters, Inc., and F.B. Hubachek, Jr., were granted leave to intervene and defend against plaintiffs' claims concerning the motorized

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[2] Pursuant to Rule 25 (d), Federal Rules of Civil Procedure, Edward Madigan is substituted for Clayton Yeutter.

portages.[3]

Background and the "Nonfeasibility" Decision

The Wilderness Act, 16 U.S.C. § 1131, et seq., requires that protected areas be administered to maintain their wilderness character for future use and enjoyment. The Boundary Waters Canoe Area Wilderness Act of 1978 (BWCAW Act), Pub.L.No 95-495, 92 Stat. 1649, designates the Boundary Waters as a wilderness to be administered in accordance with the Wilderness Act. Of particular interest here, the BWCAW Act directs the closure of the motorized portages from Sucker Lake to Basswood Lake (Prairie Portage), from Fall Lake to Basswood Lake (Four Mile Portage), and from Lake Vermilion to Trout Lake (Trout Lake Portage) after January 1, 1984, unless the Secretary determines that no feasible non-motorized means existed transport boats between the involved lakes. BWCAW Act § 4(g).

Minnesota's vast northeastern "forest-lakeland wilderness ecosystem" formed by the timeless actions of nature during ages immemorial. *Id § 1.* The BWCAW, on the other hand, was formed by the United States Congress in the crucible of the 1978 political season. The laws of nature shaped the wilderness; the making of Congress shaped the BWCAW.

The BWCAW is situated in northeastern Minnesota, along the United States/Canadian border. It consists of some 1,075,500 acres of nearly virgin lakes, waterways, and forested areas. *Id § 3.* Over one thousand lakes lie within its borders. The use of motorboats is prohibited on all but a few of these lakes. *Id §* 4(c)(1)-(4). Motorboats are permitted on the five served by the portages at issue here. The BWCAW Act not only restricts the use of motorboats, it almost completely bars mechanized portages. *Id §* 4(i). The Act,

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[3] Wilderness Outfitters, Inc., operates Four Mile Portage. F.B. Hubachek, Jr., is chairman of The Wilderness Research Foundation.

however, specifically reserves for future consideration the use of motor vehicles to transport watercraft over the portages from Sucker Lake to Basswood Lake, from Fall Lake to Basswood Lake, and Lake Vermilion to Trout Lake, after January 1, 1984.[4] *Id* § 4(g). As to these particular portages, the BWCAW Act provides that:

> Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to assist in the transport of boats across the portages from Sucker Lake to Basswood Lake, from Fall Lake to Basswood Lake, from Lake Vermilion to Trout Lake, during the period ending January 1, 1984. Following said date, *unless the Secretary determines that there is no feasible nonmotorized means of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above.*

Id. (emphasis supplied). It is the emphasized portion of § 4(g) which underlies this action.

In compliance with § 4(g)'s mandate, the Forest Service considered the feasibility of using portage wheels as an alternative to motorized portages.[5] Personnel from the Forest Service tried to cross the one-half mile Prairie Portage with a loaded motorboat on portage wheels. They were unsuccessful in their attempt. Admin. Rec. Item 1 (app. F).

Based upon a memorandum documenting the unsuccessful Prairie Portage attempt, the Forest Service, on behalf of the Secretary, determined that there was no

[4] Section 4 (d) of the BWCAW Act specifically authorizes motorized portages at the Beatty Portage and the Loon Falls Portage sites.

[5] Portage wheels consist of an axle system and two wheels, which may be strapped to a boat. This device is usually situated approximately two thirds to three quarters of the distance from the prow. If properly placed, the boat will nearly balance and may be steered and pushed by hand.

feasible nonmotorized means of transporting boats across the portages listed in § 4(g). Admin. Rec. Item 1. As a result, the Forest Service determined that the motorized portages were to be maintained. This conclusion was then incorporated into the land and resource management plan for the Superior National Forest.[6] Admin. Rec. Item 3. The plan was approved by the Regional Forester on June 6,1986. Admin. Rec. Item 4.

Plaintiffs filed their administrative appeal of the plan on June 26,1986, challenging, inter alia, the decision to continue motorized portages. Admin. Rec. Item 5. As part of their statement of reasons, dated August 27, 1986, appellants submitted a videotape which showed that three of their members had successfully traversed each of the three portages by means of portage wheels. Admin.Rec.Items 38, 38(a).

Following a December, 1987, hearing, the Chief issued a further decision concerning motorized transport across the portages. In this decision letter, dated March 10, 1989, the Chief's office determined that the "no feasibility" finding must be revisited. Admin. Rec. Item 320. The decision directed that the Regional Forester immediately halt motorized portages at the Four Mile and Trout Lake sites. The Regional Forester was instructed to conduct further studies to determine the feasibility of using nonmotorized means to traverse the three portages. *Id.* According to the plaintiffs, this instruction prompted a contact from the office of Representative Oberstar (D- Minn.), who represents the district encompassing the BWCAW. Plaintiffs assert that the congressman called in protest of the portage closures. Plaintiffs' Memorandum in Support of Partial Summary Judgment Re: Motorized Portages, 11-13 (Dec. 20, 1990). *See also* Amended Complaint ¶ 25. Presumably based, at least partially on this input, on April 20, 1989, the Chief deferred the March 10, 1989, closure decision and ordered

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[6] Such management plans are mandated under the National Forest Management Act, 16 U.S.C. § 1604.

that the two motorized portages remain open pending completion of the portage study. Admin. Rec. Item 327.

Thereafter, in July and September, 1989, Forest Service personnel were organized into one, two, and three person portage teams of both genders and various ages. These teams, using boats and loads of differing weights, conducted another study of the feasibility of portage wheels as an alternative to motorized transport at the Prairie, Four Mile, and Trout Lake portages. Admin.Rec.Item 346.

After receiving the resulting portage report, the Chief issued his decision, dated October 11, 1989, determining that "nonmotorized means of transporting boats [at these sites] . . . are not feasible. Motorized portages in these locations therefore need not terminate."[7] Admin. Rec. Item 347. This determination of nonfeasibility constitutes final

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[7] In these tests, approximately 76% of the non-motorized portages were successful. Admin.Rec.Item 346. This fact alone, however, did not dispose of the issue in the Chief's view. The Chief found dispositive the results of a companion study conducted by physiologists showing that physical danger existed for those attempting non-motorized portages. Admin.Rec.Item 347.

As part of the portage tests, three physiologists fitted individuals with devices to monitor heart rate and blood pressure during the portages in order to quantify the physical effort required. The same subjects were later given treadmill tests at St. Mary's Medical Center in Duluth, Minnesota, to assess their level of physical fitness. The physiologists then compared the physical fitness of the team members to that of the general population. The physiologists' report concluded that the test subjects were in excellent physical condition, that portaging manually with portage wheels required high levels of sustained physical effort, and that people of "average" physical ability could not use portage wheels without undue physical stress. Admin.Rec.Item 346 (app. G).

The Chief determined that "in view of medical risks," it was not feasible to portage the routes by other than motorized means because the effort required was too great for a finding of feasibility. Admin.Rec.Item 346.

agency action on the administrative claims with regard to the portage issue and is the decision which is challenged in this case.

The Parties' Positions

Plaintiffs argue that the Chief's decision constitutes agency action "not in accordance with law" and must be set aside under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The plaintiffs advance three arguments. Plaintiffs first claim that the defendants' failure to end motorized use of the three portages violates the BWCAW Act. Premised on their view of Supreme Court precedent and the legislative history of the BWCAW Act, plaintiffs claim that "feasible" means "possible." They then assert that there exists a feasible nonmotorized means of transport--the use of portage wheels. It is the plaintiffs' position that portage wheels satisfy the § 4(g) requirement and mandate the elimination of mechanized portages at all three sites. Plaintiffs next argue that the Chief's decision violates the Wilderness Act. They argue that the use of trucks to haul boats between lakes in a designated wilderness is inconsistent with three specific sections of the Wilderness Act. Plaintiffs' third argument is that the Chief's failure to end the use of these motorized portages violates his duties as a public trustee of a wilderness area. In their view, the Chiefs decision violates the obligation delegated to him by Congress to manage the Boundary Waters with a presumption in favor of wilderness values.

Underlying each of plaintiffs' arguments is the explicit allegation that the studies and investigations relied upon by the Chief do not support his finding of nonfeasibility. There is also a sub-chord suggesting that the decision to maintain motorized portages resulted from impermissible political pressure.

In reply, the defendants and intervenors argue in support of the Chief's decision and urge this Court to defer to the administrative finding of nonfeasibility. Defendants, joined

by the intervenors, contend that the BWCAW Act leaves this decision to the Chief of the Forest Service.

Specifically, the defendants and intervenors argue that the Chief's decision incorporating considerations of health andsafety into the definition of "feasible", is a permissible and rational reading of the statutory term. It is their position that this reading is consistent with the legislative history of § 4(g), the ordinary use of the word, and the administrative record. Intervenors Wilderness Outfitters and Hubachek add that motorized portages increase access to the wilderness, urge that motorized passage on the Four Mile Portage is a wilderness experience, and contend that closing Four Mile Portage to motorized passage may actually diminish wilderness values by increasing reliance on other portages. Intervenors City of Ely and Conservationists with Common Sense have submitted affidavits from various individuals setting forth their belief that portage wheels are not feasible.

Analysis

Under the APA, this Court, in reviewing final agency action, must "hold unlawful and set aside agency action, findings and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...." 5 U.S.C. § 706(2)(A). In conducting its review, the Court

> must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.... Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971) (citations omitted). This review must be based on the record already in existence and not on some record made initially in the

reviewing court. *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973).

The administrative record before this Court consists of some 350 items and numbers thousands of pages. The material ranges from letters and private observations to over eighteen hours of videotape footage of successful--and unsuccessful-- portage wheel attempts. On reviewing the record, including videotapes, the Court finds that, with the expenditure of substantial effort, a group of healthy, able-bodied individuals can, using muscle power and portage wheels, traverse each portage.[8] The record further demonstrates that such a group, at the height of exertion, cannot always accomplish the task.

The record unequivocally shows that portaging takes much longer under muscle power than when mechanized. Finally, the Court has no difficulty making two additional observations. First, a motorized portage is louder than even the most exhausting muscle powered portage. Second, a bar to motorized portages would significantly diminish the number of motor-powered boats on these five destination

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[8] The Court notes that issues of access for disabled persons are not raised by either the Wilderness Act or the BWCAW Act and were not developed in the administrative record. *But see, e.g.,* Admin.Rec.Items 47,49, 71, 73, 77, 78, 79, 83, 95, 97, 98, 102, 103, 115, 133, 134, 142, 144, 157, 159, 160, 161, 164, 166, 167, 168, 173, 175, 177, 178, 181, 188, 250, and 287 (letters expressing the view that elimination of the motorized portages would result in lack of access for disabled persons). Such questions may well arise in other circumstances or under other statutes. *See, e.g.,* Americans with Disabilities Act of 1990, 42 U.S.C. § 12207.

lakes.[9]

These conclusions, however, do not answer the immediate question before the Court: Is it feasible to transport boats to the lakes served by these portages using nonmotorized portage wheels? This case ultimately turns on the meaning of "feasible" as used in the BWCAW Act. Plaintiffs contend that "feasible" means "possible" or, perhaps, "conceivable." Defendants and intervenors suggest a meaning closer to "convenient," "practicable," or "reasonable."

The word feasible was used, albeit in a slightly different context, in the environmental protection statutes considered by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). That case involved a challenge to the authorization of federal funds to finance the construction of an interstate highway through a city park in Memphis, Tennessee. Under the Department of Transportation Act, 23 U.S.C. § 138, and the Federal-Aid Highway Act, 49 U.S.C. § 1653(f), parkland could not be claimed for a highway unless the Secretary of Transportation determined that "there is no feasible and prudent alternative use of such land." The court found the statutory language "plain and explicit," barring the use of federal funds for highway construction through parks, except in "the most unusual situations." *Id.* at 411, 91 S.Ct. at 821. For the feasibility exemption to apply, the court determined that "the Secretary must find that *as a*

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[9] As discussed above, motorboats are permitted on Sucker Lake, Basswood Lake, Fall Lake, Lake Vermillion, and Trout Lake, the lakes served by the portages at issue. By way of illustration, the Four Mile Portage (between Fall Lake and Basswood Lake) is approximately four miles long and nearly level. Nevertheless, the round trip portage took between three hours and 18 minutes and five hours and 22 minutes. Admin.Rec.Item 346. This means that a one-day fishing trip, if it includes a two hour portage to the lake, fishing, and the return two hour portage, is impractical. This situation certainly would diminish one-day lake use and consequent motor sounds from a one-day trip.

matter of sound engineering it would not be feasible to build the highway along any other route." *Id* (emphasis added, footnote omitted).

Certainly a highway engineering case is not the direct analogue to that before the Court. A review of the *Overton Park* definition of "feasible" makes it clear the Supreme Court considered the term within the context of the specific case, as opposed to adopting a dictionary or textbook definition. In *Overton Park,* a highway/parkland dispute, the Court balanced questions of "sound engineering" and preservation of the integrity of the park to arrive at the meaning of "feasible."

This Court, then, finds that it must consider feasibility within the context of a wilderness. Congress provided a definition of "wilderness" in the Wilderness Act:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of such sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c).

These words bespeak a lofty goal. But the words express an aspiration, they do not designate a path. And the words ring hollow if this carefully protected wilderness is without human appreciators. Congress has not cast the Boundary Waters Canoe Area Wilderness in aspic or proscribed its public use. Instead, the BWCAW Act, itself, seeks to balance protection of wilderness with public access to that wilderness. What does "feasible mean in this context?

As a preliminary matter, the Court is confident that it does not mean an absolute, unqualified denial of motorized access. In drafting the statute, Congress clearly knew how to bar mechanization in wilderness. As discussed above, save for the portages at issue in this case, and two others, motorized portages in the Boundary Waters are explicitly banned in the BWCAW Act.[10] Congress focused directly on these three portages and determined that it was proper to keep them open, subject to reexamination after January 1, 1984. As evidenced by the portage study, the administrative appeal, and this lawsuit, the Congressional mandate has been observed; the matter of motorized portages has been closely scrutinized.

As a secondary matter, the Court observes that the question of mechanized portages is emotionally, politically, and economically charged. All participants seek what they view as the best for the public at large and for the wilderness. No expressed position is wrong, but the positions certainly differ. For some, any motorized intrusion diminishes their wilderness experience. For others, motorized access increases wilderness appreciation. Others have a financial stake in continued motorized access. Some are simply incapable of accomplishing a nonmotorized portage. There are still others, even the most hale, whose view of wilderness enjoyment encompasses a day-trip and then a return to civilization's hurly-burly. Each views the Boundary Waters through a single facet of the prism. And many views, as opposed to any single view, were

[10] BWCAW Act §§ 4 (d), (g), (i).

considered when Congress, as the political body which accommodates compromise, created BWCAW.

It is in this respect that the Court rejects the plaintiffs' suggestion that political influence is illegitimate. Politics, understood as the combat of competing interests held by members of the body politic, was integral in the founding of the BWCAW and continues to be so. It is in the legislative and administrative processes that competing interests are weighed and balanced.

The legislative history on the issue of motorized portages makes this clear. The House and Senate versions of what eventually became the BWCAW Act differed significantly. The House bill, H.R. 12250, 95th Cong., 2d Sess. (1978), sponsored by Representative Burton (D-Calif.), would have terminated all five mechanized portages which were operating in the Boundary Waters in 1978. The Senate version, S. 3242, 95th Cong., 2d Sess., 124 Cong.Rec. 18, 744-47 (1978), sponsored by Senator Anderson (D-Minn.), on the other hand, would have permitted continued operation of the existing portages. During deliberation on the Senate bill, the Senate Committee sought a compromise from the proponents and opponents of the continued use of motorized portages. 124 Cong.Rec. 34,851 (1978). The resulting compromise, known as the "Dayton-Walls compromise," was encompassed in §§ 4(d) and 4(g) of the BWCAW Act.

Plaintiffs claim that the legislative history reflects an understanding that "feasible" meant "possible." They base this argument on the eight-years-after-the-fact statement of Attorney Charles Dayton (the Dayton in "Dayton-Walls), made August 17, 1986. Mr. Dayton avers that he and Walls, years before, understood "feasible" to mean "a motorboat would be capable of being transported by three able-bodied adults between the lakes in question...." Admin.Rec.Item 38 (app. Vol. I at 80-81). Plaintiffs further rely on statements made on the House floor by Representative Burton. 124 Cong.Rec. 38,514-15 (1978). Plaintiffs maintain that Representative Burton's interpretation of the meaning of

feasible is on a par with the conference committee report itself.

Defendants counter by showing that "feasible" was simply the word used to temporarily resolve their issue. In their view, that same legislative history supports an interpretation of "feasible" which includes considerations of the health and safety of the persons using the portages. In their view, Mr. Dayton's personal understandings are not part of the legislative history, and Representative Burton's remarks are entitled to no weight whatsoever.

This Court finds that the legislative history of the BWCAW Act reflects the same competing interests arrayed in this proceeding. Senator Anderson's draft bill suggested an interest in continued easy public accessibility. Representative Burton's version evidenced an interest in a complete ban on motorized routes. Neither version was adopted and the result was a compromise. As to these specific portages, Congress delayed and delegated the final decision to the Forest Service. Now, some thirteen years later, this Court is asked to review such a decision.

This Court finds that the Chief's October 11, 1989, decision, finding that there is no feasible alternative to motorized portaging, was neither arbitrary, capricious, nor an abuse of discretion. The Court further finds that his decision was not contrary to law. In this regard, the Court finds that the term feasible was properly considered and applied within its statutory context. As detailed above, "feasible" had to mean something more than either a prohibition or mere conceivability. In *Overton Park*, the Supreme Court focused on a "matter of sound engineering." Here the Chief, and this Court, must focus on matters of human capabilities in conjunction with citizen access to a managed wilderness. When viewed in this light, the Court concludes that the Chief's decision is in accord with the BWCAW Act, the Wilderness Act, and prudent wilderness management.

The Court rejects plaintiffs' view that "feasible" means "possible." On the most trivial level, had Congress meant for motorized portages to be halted if any other method were possible, Congress could have so legislated. The statute employs a different term. More fundamentally, "feasible," as used in the context of a wilderness which is to be available to the general citizenry--some of whom seek a pristine experience and some of whom seek one less pristine and more accessible--is more properly thought of as "reasonably convenient or usable."

On this basis, the Court finds that the Chief's definition of the term feasible is a permissible construction of the BWCAW Act. The Act's express delegation of the determination to the agency is best harmonized with the goals of the Wilderness Act by interpreting "feasible" to permit the continued operation of the motorized portages at Prairie Portage, Four Mile Portage, and Trout Lake Portage.

Based upon the files, records, and proceedings herein, IT IS ORDERED that:

1. Pursuant to Rule 25(d), Federal Rules of Civil Procedure, Edward Madigan is substituted for defendant Clayton Yeutter.

2. Defendants' and intervenor-defendants' motions for summary judgment on Count I of the amended complaint and that part of Count III of the amended complaint relating to motorized transport across the Four Mile, Prairie, and Trout Lake Portages in the Boundary Waters Canoe Area Wilderness are granted.

3. Plaintiffs' motion for summary judgment on Count I of the amended complaint and that part of Count III of the amended complaint relating to motorized transport across the Four Mile, Prairie, and Trout Lake Portages in the Boundary Waters Canoe Area Wilderness is denied.

4. Plaintiffs' request for attorneys' fees pursuant to the

Equal Access to Justice Act, 28 U.S.C. § 2412, is denied.

5. Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Court finds no just reason to delay entry of final judgment on Count I of the amended complaint and that part of Count III of the amended complaint relating to motorized transport across the Four Mile, Prairie, and Trout Lake Portages in the Boundary Waters Canoe Area Wilderness.

LET JUDGMENT BE ENTERED ACCORDINGLY

APPENDIX C

United States Court of Appeals

For The Eighth Circuit

No. 91-3032MNMI

Friends of the Boundary Waters Wilderness, et al.,	*	
	*	Order Denying
Appellants,	*	Petitions for
	*	Rehearing and
vs.	*	Suggestions for
	*	Rehearing
F. Dale Robertson, etc., et al.,	*	En Banc
	*	
Appellees.	*	

The suggestions for rehearing en banc are denied. Judge Bowman, Judge Magill, Judge Hansen, and Judge Morris S. Arnold would grant the suggestions for rehearing en banc.

The petitions for rehearing are also denied.

Judge Loken took no part in the consideration or decision of this case.

January 26, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX D

PUBLIC LAW 95-495-Oct. 21, 1978

Public Law 95-495
95th Congress

An Act

To designate the Boundary Waters Canoe Area Wilderness, to establish the Boundary Waters Canoe Area Mining Protection Area, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS

SECTION 1. The Congress finds that it is necessary and desirable to provide for the protection, enhancement, and preservation of the natural values of the lakes, waterways, and associated forested are as known (before the date of enactment of this Act) as the Boundary Waters Canoe Area, and for the orderly management of public use and enjoyment of that area as wilderness, and of certain contiguous land and waters, while at the same time protecting the special qualities the area as a natural forest-lakeland wilderness ecosystem of major esthetic, cultural, scientific, recreational and educational value to the Nation.

Purposes

SEC. 2. It is the purpose of this Act to provide for such measures respecting the areas designated by this Act as the Boundary Water Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area as will -

(1) provide for the protection and management of the fish and wildlife of the wilderness so as to enhance public enjoyment and appreciation of the unique biotic resources of the region,

(2) protect and enhance the natural values and

environment quality of the lakes, streams, shorelines and associated forest are as of the wilderness,

(3) maintain high water quality in such areas,

(4) minimize to the maximum extent possible, the environmental impacts associated with mineral development affecting such areas,

(5) prevent further road and commercial development and restore natural conditions to existing temporary roads in the wilderness, and

(6) provide for the orderly and equitable transition from motorized recreational uses to nonmotorized recreational uses on those lakes, streams, and portages in the wilderness where such mechanized uses are to be phased out under the provisions of this Act.

BOUNDARY WATERS CANOE AREA WILDERNESS DESIGNATION AND MAP

SEC. 3. The areas generally depicted as wilderness on the map entitled "Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area" dated September 1978, comprising approximately one million and seventy-five thousand five hundred acres, are hereby designated as the Boundary Waters Canoe Area Wilderness (hereinafter referred to as the "wilderness"). Such designation shall supersede the designation of the Boundary Waters Canoe Area under section 3 (a) of the Wilderness Act (78 Stat. 890) and such map shall supersede the map on file pursuant to such section. The map of the wilderness shall be on file and available for public inspection in the offices of the Supervisor of the Superior National Forest and of the Chief, United States Forest Service. The Secretary of Agriculture, hereinafter referred to as "The Secretary" shall as soon as practicable but in no event later than one year after the date of enactment of this Act publish a detailed legal description and map showing the boundaries of the wilderness in the Federal Register. Such map and description shall be filed with the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the United

States Senate. Such map and description shall have the same force and effect as if included in this Act. Correction of clerical and typographical errors in such legal description and map may be made.

ADMINISTRATION

SEC. 4.(a) The Secretary shall administer the wilderness under the provisions of this Act, the Act of January 3, 1975 (88 Stat. 2096: 16 U.S.C 1132 note), the Wilderness Act of 1964 (78 Stat. 890,16 U.S.C. 1131-1136) and in accordance with other laws, rules and regulations generally applicable to areas designated as wilderness.

(b) Paragraph (5) of section 4(d) of the Wilderness Act of 1964 is hereby repeated and paragraphs (6) (7) and (8) of such section 4(d) are hereby redesignated as paragraphs (5) (6), and (7).

(c) Effective on January 1,1979, the use of motorboats is prohibited within the wilderness designated by this Act and that portion within the wilderness of all lakes which are partly within the wilderness, except for the following:

(1) On the following lakes motorboats with motors of no greater than twenty-five horsepower shall be permitted: Fall, Lake County; Newton, Lake County; Moose Lake County; Newfound Lake County; Sucker, Lake County: Snowbank, Lake County: East Bearskin. Cook County; South Farm Lake County; Trout, Saint Louis County; Basswood except that portion generally north of the narrows at the north end of Jackfish Bay and north of a point on the international boundary between Ottawa Island and Washington Island: Saganaga Cool; County except for that portion west of American Point; *Provided*: That, on the following lakes until January 1,1984 the horsepower limitations described in this paragraph shall not apply to boats registered with the Secretary: Moose Lake County: Newfound, Lake County; Sucker, Lake County; Saganaga Cook County as limited in this paragraph.

(2) On the following lakes and river motorboats with motors no greater than ten horsepower shall be permitted: Clearwater, Cook County: North Fowl, Cook County: South Fowl, Cook County: Island River east of Lake Isabella, Lake County, Sea Gull, that portion generally east of Threemile Island, Cook County: Alder, Cook County, Canoe Cook County.

(3) On the following lakes, or specified portions of lakes, motorboats with motors of no greater than ten horsepower shall be permitted until the dates specified: Basswood River to and including Crooked Lake, Saint Louis and Lake Counties, until January 1, 1984: Carp Lake, the Knife River, and Knife Lake, Lake County, until January 1, 1984; Sea Gull, Cook County, that portion generally west of Threemile Island, until January 1, 1999: Brule,
Cook County, until January 1, 1994, or until the termination of operation of any resort adjacent to Brule Lake in operation as of 1977, whichever occurs first.

(4) On the following lakes, or specified portions of lake motorboats with motors of no greater than twenty-five horse power shall be permitted until January 1, 1984: Birch, Lake County; Basswood, Lake County, that portion generally north o the narrows at the north end of Jackfish Bay and north of a point on the international boundary between Ottawa Island and Washington Island.

(d) The detailed legal description and map to be published pursuant to section 3 of this Act shall contain a description of the various areas where the motorized uses permitted by this section are located. No provision of this section shall be construed to limit mechanics portages or the horsepower of motors used on motorboats in the following areas within the wilderness:

Little Vermilion Lake, Saint Louis County; Loon River, Saint Louis County; Loon Lake, Saint Louis County; that portion of the Lac La Crois, Saint Louis County, south of Snow Bay and east of Wilkins Bay.

(e) For the purposes of this Act, a snowmobile is defined as and motorized vehicle which is designed to

operate on snow or ice. The use of snowmobiles in the wilderness designated by this Act is not permitted except that the Secretary may permit snowmobiles, not exceeding forty inches in width, on (1) the overland Portages from Crane Lake to Little Vermilion Lake in Canada, and from Sea Gull River along the eastern portion of Saganaga Lake to Canada, and (2) on the following routes until January 1, 1984:

Vermilion Lake portage to and including Trout Lake; Moose Lake to and including Saganaga Lake via Ensign, Vera and Knife Lakes, East Bearskin Lake to and including Pine Lake via Alder Lake and Canoe Lake.

In addition to the routes listed above, the Secretary may issue special use permits for the grooming by snowmobiles of specified crosscountry ski trails for day use near existing resorts.

(f) The Secretary is directed to develop and implement, as soon as practical, entry point quotas for use of motorboats within the wilderness portions of the lakes listed in subsection c, the quota levels to be based on such criteria as the size and configuration of each lake, and the amount of use on that lake: *Provided,* That the quota established for any one year shall not exceed the average actual annual motorboat use of the calendar years 1976, 1977, and 1978 for each lake, and shall take into account the fluctuation in use during different times of the year: *Provided further,* That on each lake homeowners and their guests and resort owners and their guests on that particular lake shall have access to that particular lake and their entry shall not be counted in determining such use.

(g) Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to assist in the transport of boats across the portages from Sucker Lake to Basswood Lake, front Fall Lake to Basswood Lake, and from Lake Vermilion to Trout Lake, during the period ending January 1, 1984. Following said date, unless the Secretary determines that there is no feasible nonmotorized means of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above.

(h) The motorized uses authorized by this section shall be confined to those types of snowmobiles, motorboats and vehicles which have been in regular use in the Boundary Waters Canoe Area prior to the date of enactment of this Act. The Secretary may set forth additional standards and criteria to further define the type of motorized craft which may be permitted.

(i) Except for motorboats, snowmobiles, and mechanized portaging, as authorized and defined herein, no other motorized use of the wilderness shall be permitted. Nothing in this Act shall prohibit the use of aircraft, motorboats, snowmobiles, or other mechanized uses in emergencies, or for the administration of the wilderness area by Federal, State, and local governmental officials or their deputies, only where the Secretary finds that such use is essential.

RESORTS

SEC. 5.(a) The owner of a resort in commercial operation during 1975,1976 or 1977 and located on land riparian to any of the lakes listed below may require purchase of that resort, including land and buildings appurtenant thereto, by written notice to the Secretary prior to September 30,1985. The value of such resort for purposes of such sale shall be based upon its fair market value as of July 1,1978, or as of the date of said written notice, whichever is greater, without regard to restrictions imposed by this Act:

Fall Lake County, Moose, Lake County, Snowbank, Lake County, Lake One, Lake County, Sawbill, Cook County, Brule, Cook County, East Bearskin, Cook CountY, Clearwater. Cook County, Saganaga, Cook County, Sea Gull, Cook County, McFarland, Cook County, North Fowl, Cook County, South Fowl, Cook County, Jasper Lake, Lake County, Ojibway, Lake County.

(b) An owner requiring purchase of a resort under this provision may elect to retain one or more appropriate buildings and lands not exceeding three acres, for personal

use as a residence: *Provided,* That the purchase price to the Government for a resort shall be reduced by the fair market value of such buildings and lands, with the same valuation procedures outlined above.

(c) With respect to any privately owned lands and interests in lands riparian to the lakes listed above, and if the Federal Government has been required to purchase a resort on said lake, said lands shall not be sold "without first being offered for sale to the Secretary who shall be given a period of one hundred days after the date of each such offer within which to purchase such lands. No such lands shall be sold at a price below the price at which they have been offered for sale to the Secretary, and if such lands are reoffered for sale they shall first be reoffered to the Secretary: *Provided,* That, this right of first refusal shall not apply to a change in ownership of a property within an immediate family.

(d) There are authorized to be appropriated such sums as may be necessary for the acquisition of lands and interests therein as provided by this section.

TIMBER SALE CONTRACTS

SEC. 6.(a) The Secretary is directed to terminate within a period of one year after the date of passage of this Act, all timber safe contracts in the Boundary Waters Canoe Area Wilderness. There shall be no further logging of the virgin forest areas formerly enjoined from logging by the United States District Court on said contract areas during the termination period.

The purpose of said termination period is only to permit complete of the harvesting of timber within existing areas under contract that are not within the areas described above and permit the taking ameliorative measures, including land and cover restoration that will, at the earliest feasible date, make the imprint of man's work substantially unnoticeable on the lands included as wilderness in this Act.

(b) (1) In the event that termination of timber sale contracts subsection (a) reduces the total national forest volume which a purchaser has under contract on the Superior National Forest to less than two years cut based on

the average volume of Superior National For timber harvested by the purchaser in the last three years, the Secretary may, with the consent of the purchaser, substitute, to the extent practicable, timber on other national forest lands approximately equal in species and volume to the timber sale contract affected. In offering substitute timber, the Secretary shall negotiate the substitution a price that is mutually equitable considering such factors as species volume, logging accessibility, and other terms of the agreement.

(2) The United States will pay just compensation for any timber contracts terminated or modified by this Act, consistent with amendment V to the Constitution of the United States. Losses due to costs incurred in directly fulfilling the terms of such contracts shall be paid by the United States. Any action for the recovery from the United States of cost as provided above shall be brought in a court of competent jurisdiction. Any such judgments shall be paid from the claims and judgments fund (31 U.S.C. 724a).

(c) Within the limits of applicable laws and prudent forest management:

(1) the Secretary shall, in furtherance of the purposes of subsection (a) of this section and of section 4 of the National Forest Management Act of 1376 (90 Stat. 2949), expedite the intensification of resource management including emphasis on softwood timber production and hardwood utilization on the nation forest lands in Minnesota outside the wilderness to offset, to the extent feasible, the reduction in the programmed allowable timber harvest resulting from reclassification of the boundary Waters Area, and the Secretary shall make a review of progress to date 1983, and a forecast of planned achievements by 1985 and shall submit, as a part of the 1985 program under the schedule call for in the Resources Planning Act of 1974, a Plan and recommendations for 1985-1990. In administering the Superior National Forest, the Secretary is authorized and directed to engage artificial and natural regeneration, release, site preparation, and other forms of timber production enhancement.

(2) The Secretary, in carrying out the requirements

in section (c) (1), is authorized and directed to cooperate with the State Minnesota and its political subdivisions to develop and implement a system of grants, for the development of renewable resources on State, County and private lands. He may also seek the cooperatic of other Federal departments and agencies to assure a coordinated approach to renewable resources development.

(d) There is authorized to be appropriated in addition to such sun as may otherwise be appropriated for the Superior National Forest from existing authorities established by law, the following addition sums for the fiscal years 1980 through 1990 inclusive:

(1) to carry out the purposes of subsection 6(c) (1) an additional $8,000,000 annually; and

(2) to carry out the purposes of subsection 6(c) (2) an additional $3,000,000 annually: *Provided, however,* That the Federal share of any grant made pursuant to subsection 6(c) (2) shall not exceed 80 percent of the total cost of said grant.

(e) Funds appropriated pursuant to this section shall remain available until expended. Authorizations in excess of funds appropriated in a given fiscal year shall remain available for appropriation in subsequent fiscal years.

(f) In addition to those personnel who would otherwise be available, the Secretary is authorized to appoint and fix the compensation (not to exceed that of grade 15 on the General Schedule for Federal employees) of additional full-time personnel for the Superior National Forest to carry out the purposes of this Act.

LAWS APPLICABLE TO CERTAIN LANDS AND WATERS IN THE SUPERIOR NATIONAL FOREST

SEC. 7.(a) The provisions of the Acts listed in paragraph (b) of this section shall continue to apply to lands and water; specified in such Acts notwithstanding the inclusion of any such lands and waters. in the wilderness or mining protection area designated under this Act. For lands and waters to which such Acts listed in paragraph (b) apply

which are also within the wilderness. or mining protection area designated under this Act, any withdrawal, prohibition, or restriction contained in such Acts listed in paragraph (b) shall be in addition to any withdrawal, prohibition, or restriction otherwise applicable to such wilderness or mining protection area under any other law.

(b) The Acts referred to in paragraph (a) are as follows:

(1) The Act of July 10,1930 (46 Stat. 1020; 16 U.S.C. 577a, 577b), herein referred to as the "Shipstead-Nolan Act".

(2) The Act of June 22, 1948 (62 Stat. 568, as amended, 16 U.S.C. 577c-577b), herein referred to as the "Thye-Blatnik Act".

(c) The provisions of the Shipstead-Nolan Act are hereby extended and made applicable to all lands and waters not otherwise subject to such Act which are within the wilderness designated under this Act.

(d)(1) The authorities contained in the Thye-Blatnik Act are hereby extended and made applicable to all lands and waters not otherwise subject to such Act which are within the wilderness designated under this Act.

(2) In applying the second proviso of section 5 of such Thye-Blatnik Act to the areas to which such Act is extended and made applicable under this subsection, the phrase "fiscal year 1980" shall be substituted for the phrase "the first full fiscal year after the approval of this Act" in such proviso.

(3) There are authorized to he appropriated such sums as may be necessary to carry out the provisions of the Thye-Blatnik Act with respect to the lands and waters within the wilderness designated under this Act. Such sums may be used for the payment of court judgments in condemnation actions brought under the terms of the Thye-Blatnik Act without reward to the date such condemnation actions were initially instituted. Funds appropriated from the Land and Water Conservation Fund may be used for the acquisition of any lands and waters, or interests therein within such wilderness.

EXISTING AIRSPACE RESERVATION

SEC. 8. The provisions of Executive Order 10092 as made applicable to the Boundary Waters Canoe Area established by the Wilderness Act of 1964 shall be deemed incorporated into this Act.

MINING PROTECTION AREA ESTABLISHMENT

SEC. 9. In order to protect existing natural values and high standard of environmental quality from the adverse impacts associated with mineral development, there is hereby established the Boundary Water Canoe Area Mining Protection Area (hereinafter in this Act referred to as the "mining protection area"), comprising approximately two hundred and twenty-two thousand acres.

MAP AND BOUNDARIES

SEC. 10. The mining protection area shall comprise the area general depicted as a mining protection area on the map entitled "Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area" dated September 1978, which shall be on file and available for public inspection in the offices of the Supervisor the Superior National Forest and of the Chief, United States Forest Service. As soon as practicable after this Act takes effect, the Secretary shall file a map and a legal description of the mining protection area with the Committee on Interior and Insular Affairs of the House Representatives and the Committee on Energy and Natural Resource of the United States Senate. Such map and description shall have the same force and effect as if included in this Act. Correction of clerical and typographical errors in such description may be made.

MINING AND MINERAL LEASING IN THE WILDERNESS AND MINING PROTECTION AREA

SEC. 11.(a) In addition to any other applicable

prohibition or withdrawal from entry or appropriation under any provision of the Wilderness Act or under any other provision of law, no permit, lease, or other authorization may be issued by any agency or authority of the United States for--

(1) exploration for, or mining of, minerals owned by the United States within the Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area; or

(2) exploration for, or mining of minerals within such areas if such activities may affect navigable waters; or

(3) the use of property owned by the United States in relation to any mining of or exploration for minerals in such areas which may materially impair the wilderness qualities of the wilderness area or which may materially impair the natural values and environmental quality of the mining protection area.

The prohibitions contained in this subsection and any withdrawal from entry or appropriation for mining of or exploration for mineral applicable to the Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area shall not apply to the extent specifically provided in legislation enacted by the United States after the date of enactment of this Act pursuant to a national emergency declared by the President.

(b) (1) Consistent with the prohibitions and other requirements in subsection (a) of this section, no permit, lease. or other authorization shall be issued unless and until--

(A) the Secretary shall have approved a plan that details how mining will be conducted consistent with this Act and with other Federal, State, and local requirements, and that details how the area will be restored to its original condition or to a substantially equivalent condition, including the estimated cost thereof;

(B) the applicant has posted a bond for performance payable to the United States in an amount determined by the Secretary to be sufficient

to assure completion of the reclamation plan if the work had to be performed by the United States;

(C) the applicant shall have obtained all permits, licenses, certifications, and approvals required by Federal, State or local law; and (iv) the Secretary has determined that no permanent facility will be constructed nor alteration will occur that could render the area incapable of reverting to its original condition or to a substantially equivalent condition.

(2) The provisions of paragraphs (2) and (3) of section 4(d) of the Wilderness Act (78 Stat. 890;16 U.S.C. 1133(d)(2) and 16 U.S.C. 1133(d)(3)) shall not apply to the area designated herein as the Boundary Waters Canoe Area Wilderness.

(c) The Secretary is authorized to acquire any minerals or mineral rights within the wilderness and mining protection area alleged to be owned by persons other than the Federal or State governments in the following manner:

(1) The Secretary first may seek to acquire these minerals or mineral rights by donation. In seeking a donation, the Secretary shall inform the person alleging the ownership interest of the procedures and limitations to the followed in acquisition by purchase as set forth in paragraph (2) below.

(2) If the person alleging the ownership interest does not donate his minerals or mineral rights to either the Federal or State governments, the Secretary is authorized to acquire the rights by purchase, within the limits of funds appropriated for property acquisition in the Superior National Forest, and in an amount appropriately discounted for the following factors if existent in relation to the particular mineral interest:

(A) The original patenting from the Federal public domain was fraudulent. The patenting of lands in the Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area is prima facie fraudulent if (1) the Act under which the patent was issued was one of the Acts intended to put settlers on the land, such as, but without limitation, the Cash Purchase Act of 1820

(chapter LI, Act of April 24, 1820, 3 U.S. Stat. 566, 567, as amended); the Preemption Act of 1830 (chapter CCVIII, Act of May 29, 1830, 4 U.S. Stat. 420, 421, as amended); the Homestead Act of 1862 (chapter LXXV, Act of May 20, 186", 12 U.S. Stat. 392-394, as amended); and the Timber and Stone Act (chapter 150, Act of .June 3, 1878, 20 U.S. Stat. 88, 89, as amended, particularly by chapter 375, Act of August 4, 189-2, 27 U.S. Stat. 348); and (2) the land was patented after 1875 and before the establishment of the Superior National Forest by proclamation on February 13, 1909. The Secretary also shall consider any other evidence of fraud when determining the value of the minerals such as (1) the transfer by the entryman or patentee of whole or partial interests in the property during the patenting process or soon thereafter, (2) the appearance in the chain of title of persons known to have participated in land speculation as land brokers, entrymen, or in other capacities.

(B) The date of separation of the mineral or mineral rights from the surface interest, if the separation occurred after 1927, the year when the courts have determined that the, roadless policy was established by the Secretary for the area.

(C) Any other factor, such as restrictions on mining within the area imposed by State or local government, or by operation of treaty.

(d) In the event any legal action or proceeding is instituted by or against the United States in relation to minerals or mineral rights where the patenting is prima facie fraudulent as described in subsection (c) of this section. the Attorney General of the United States shall assert the public's equitable right to constructive or public trusts, or to recover or offset damages including but not limited to those based on the value of land fraudulently acquired plus interest at 6 per centum per annum.

(e) Notwithstanding any requirement of this section, the, Secretary shall have authority to acquire within the wilderness or mining protection area designated by this Act,

existing mineral interests by donation, purchase, exchange, or through exercise of the power of eminent domain.

(f) There is authorized to be appropriated to the Secretary such sums as may be required to carry out the purposes of this section, to be available until expended.

SEVERABILITY

SEC. 12. If any provision of this Act is declared to be invalid, such declaration shall not affect the validity of any other provision hereof.

EXISTING STRUCTURES

SEC. 13. Nothing in this Act or the Wilderness Act shall be construed to prohibit the maintenance of the Prairie Portable Dam (on the international boundary chain between Birch and Basswood Lakes), and the Secretary is authorized to perform such maintenance work as may be required to keep that dam functional at its present height and width. The Secretary is authorized to maintain other existing water control structures only where such structures are necessary to protect wilderness values or public safety.

JURISDICTION OVER FISH AND WILDLIFE

Sec. 14. Nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the state with respect to fish and wildlife in the wilderness and the mining protection area.

JURISDICTION OVER WATERS

Sec. 15. The Secretary is authorized to promulgate and enforce regulations that limit or prohibit the use of motorized equipment on or relating to waters located within the wilderness in accordance with the provisions of this Act: *Provided.* That nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the State with respect to such waters except to the extent that the exercise of

such jurisdiction is less stringent than the Secretary regulations promulgated pursuant to this section: *Provided further,* That any relations adopted pursuant to this act shall be complimentary to, and not in derogation of regulations issued by the United States Coast Guard.

The Secretary is authorized to enter into cooperative agreements with the State of Minnesota with respect to enforcement of Federal and State regulations affecting the wilderness and the mining protection area.

COOPERATION WITH STATE

SEC. 16.(a) The Secretary shall cooperate with the State of Minnesota and any political subdivision thereof in the administration of the mining protection area and in the administration and protection of lands within or adjacent to the mining protection area owned or controlled by the State or any political subdivision thereof. Nothing in this title shall deprive the state of Minnesota or any political subdivision thereof of its right to exercise civil and criminal jurisdiction within the wilderness and the mining protection area and impose land use controls and environmental health standards on non-Federal areas within the wilderness and the mining protection area, or of its right to tax persons, corporations, franchises, or other non-Federal property, including mineral or other interests, in or on lands or waters within the wilderness and the mining protection area.

(b) The Secretary is authorized to enter into cooperative agreements with the State of Minnesota with respect to enforcement of Federal and State regulations affecting the wilderness and the mining protection and shall consult with the State of Minnesota in an effort to enhance the multiple-use benefits to be derived from both State and national forest lands.

TREATIES

SEC. 17. Nothing in this Act shall affect the provisions of any treaty now applicable to lands and waters which are included in the mining protection area and the wilderness.

EXPANSION OF RECREATION PROGRAMS

SEC. 18.(a) The Secretary is authorized and directed to expedite and intensify the program of dispersed outdoor recreation development on the Superior National Forest outside the Boundary Waters Canoe Area Wilderness as designated by this Act. The Secretary shall consider in such new program development the need for the following: additional snowmobile trails, particularly those now planned or under construction; remote campsites on lightly developed lakes; and lake access sites and parking facilities to provide motorized recreation experiences similar to those previously available in the Boundary Waters Canoe Area.

(b) The Secretary, consistent with the Wilderness Act of 1964 and with this Act, is authorized to construct a system of new hiking, backpacking and cross-country ski trails within the Boundary Waters Canoe Area Wilderness as designated by this Act, and on appropriate adjacent Federal lands outside the wilderness. In constructing such a trail system, consideration should be given to locating portions of the system near existing resorts on the perimeter of the wilderness to provide additional outdoor recreation opportunities for resort guests.

(c) The Secretary is authorized and directed to develop an educational program for the recreational users of the wilderness which will assist them to understand the purpose, value, and appropriate use of wilderness lands and the functioning of natural ecosystems in wilderness.

(d) The Secretary in cooperation with the State of Minnesota and other appropriate groups, consistent with the purposes of this Act, is authorized and directed to develop a program providing opportunities for a wide range of outdoor experiences for disabled persons.

(e) There are authorized to be appropriated such sums as may be necessary for the Secretary to carry out the purposes of this section.

SEC. 19.(a) The Secretary, in cooperation with other appropriate executive agencies, is authorized and directed to develop a cooperative program of technical and financial assistance to resorts in commercial operation in 1975,1976,

and 1977, and outfitters in commercial operation in 1977 which are located within the mining protection area which are located on land adjacent to and of the lakes listed in section of this Act. There are authorized to be appropriated such sums as may be necessary for the purposes of this subsection.

(b) There are authorized to be appropriated to the Secretary funds to be made available as grants to the Agricultural Extension Service, University of Minnesota to provide over a three-year period educational and technical assistance to business and communities adjacent to the Boundary Waters Canoe Area Wilderness in order to improve economic opportunities for tourism) and recreation-related businesses in a manner which is complementary to the management of the wilderness.

MANAGEMENT STUDY

SEC.20. The Secretary acting through the Chief, United States Forest Service, shall, not later than October 1,1981, submit to the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a comprehensive management plan setting forth the specific management procedures to implement the objectives of this Act. An interim report setting forth public involvement procedures, management alternatives, and a timetable for the remaining study actions, shall be submitted within one year from the date of enactment of this Act.

LIMITATION OF AUTHORIZATIONS

Sec. 21 All authorizations for any funds to be appropriated under the terms of this Act shall not be effective until October 1, 1979. Notwithstanding any other provision of this Act, authority to enter into agreements or to make payments under this Act shall be effective only to the extent or in such amounts as are provided in advance in appropriation Acts.

Approved October 21, 1978

APPENDIX E

United States Department of Agriculture — Forrest Service

Reply to: 2320

Subject: Determination of Nonfeasibility - BWCA

To: Regional Forester, R-9

I have reviewed The Portage Report and video documentation of the portage tests. After careful consideration of all factors, including those relating to the health and safety of those individuals who use the portages, I have decided that it is not feasible to portage the Trout Lake, Four Mile, and Prairie Portages with other than motorized means. The Determination of Nonfeasibility for the Trout Lake, Four Mile and Prairie Portages which documents my findings and my reasoning is enclosed.

Because these are findings required by the BWCA Wilderness Act, and since there is no National Environmental Policy Act requirement associated with these findings, my Determination of Nonfeasibility for the Trout Lake, Four Mile, and Prairie Portages is not appealable under 36 CFR 217.

/s/ F. Dale Robertson
F. DALE ROBERTSON
Chief

Enclosure

Determination of Nonfeasibility for Three Motorized Portages Within the Boundary Waters Canoe Area Wilderness

For the reasons set forth below, I hereby determine that nonmotorized means of transporting boats from Sucker Lake to Basswood Lake (Prairie Portage), from Fall Lake to Basswood Lake (Four Mile Portage), and from Lake Vermilion to Trout Lake (Trout Lake Portage) in the Boundary Waters Canoe Area (BWCA) Wilderness are not feasible. Motorized portages in these locations therefore need not terminate.

Background

In 1978, Congress passed the Boundary Waters Canoe Area Wilderness Act (Public Law No. 95-495). The Act prohibited motorized use in some areas and permitted motorized use to continue in others, but, for one issue at least, it merely deferred controversy. This issue concerns the use of three motorized portages, that is, hauling boats and equipment over portages with motor vehicles. Motorized portages were allowed by the Act until January 1, 1984. After that date they were to close, unless a finding was made that nonmotorized means of portaging are not "feasible":

> "Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to assist in the transport of boats across the portages from Sucker Lake to Basswood Lake, from Fall Lake to Basswood Lake, and from Lake Vermilion to Trout Lake, during the period ending January 1, 1984. Following said date, unless the Secretary determines that there is no feasible nonmotorized means of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above."

In 1981, the Forest Service attempted to cross Prairie Portage with a boat, motors, and equipment. It was concluded that nonmotorized means was not feasible for that portage. Trout Lake and Four Mile Portages were not tested. The finding for Prairie Portage was simply applied to these portages.

These conclusions were incorporated into the Forest Plan for the Superior National Forest and the continued use of motorized portages was raised as an issue in a Forest Plan appeal (appeal #1628). In my March 10, 1989, decision on that appeal, I concluded that the finding of nonfeasibility for Prairie Portage was sufficiently called into question by appellants and that a new study should be performed. As for the Four Mile and Trout Lake Portages, the lack of any determination specific to each of them required their termination pending a separate study of them. On April 20, 1989, I ordered that the closing of the Four Mile and Trout Lake motorized portages be delayed until after completion of the study. Immediate closing of these portages, I found, would have greatly disrupted the existing plans of many parties that had already reserved wilderness entry permits with the understanding that motorized transport would be available to portage their boats and equipment.

Testing took place during July and September 1989, using various combinations of party size and loads, over all three portages. The test procedures and the results were compiled in "The Portage Report," prepared by the Superior National Forest. The administrative record consists of the report, the f documents used in the preparation of the report, and eighteen hours of videotape of the portage crossings.

Feasibility

Before explaining the reasons that led me to the conclusions on these portages "feasibility," the required standard, should be addressed. In my March 10, 1989, decision I stated that "'feasible' does not mean `ideal' or `most practical,'" but

means "`possible'." Dictionary definitions show a range of meanings, from "possible" and "capable of being done" to "reasonable" and "likely." I believe that although testing may show portaging by nonmotorized means can be done, the risk to health and safety of portages should be taken into account in determining "feasibility" Wilderness travel can and should be an adventure and a challenge. However, a wilderness, hours away from medical attention, is not the place to omit any sense of reasonableness from feasibility. Therefore, even if we assume that persons of typical physical condition may be able to perform a task, if there is considerable risk to their health and safety, the task is not feasible.

The Tests

The Portage Report explains the testing procedure, and I will not repeat the description here (See Section III at pages 5-8; Appendices E, F). Mention should be made, however, of certain aspects of the testing. First, various combinations of party size were tested. At the time of passage of the BWCA Wilderness Act, in comments made on the floor of the House of Representatives, Representative Philip Burton stated his view that the measure of feasibility should involve three able-bodied adults moving boats of no more than 25 horsepower motors, and gear (Congressional Record October 14, 1978 at H 13438). The tests included both two and three person parties, since two person fishing parties are apparently common in the BWCA Wilderness.

Second, only the option of portage wheels was used. Representatives from both sides of the issue made it clear that although other means (specifically, horses), were possible, such means were unreasonable.

In addition, three sizes of loads were used, and both two and three person parties hauled these loads. Doubtless there will be disagreement as co the appropriate gear to include in a test, but testing three different sizes of loads appeared to be

the most reasonable method of reconciling disputes. The loads chosen were developed from the test made by appellants, from observations in the field, and from a meeting on May 9, 1989, with members of the public at the Cloquet Forestry Center.

Further, the participants in the tests, all Forest Service employees, were intended to represent the general populace using the portages. Physical fitness tests showed, however, that all the participants were in the 40th percentile and above of fitness for their ages, indicating that they were more fit than "normal" people. Most participants were above the 90th percentile of fitness. Their accomplishments must be considered in : It of their physical condition.

The participants were expected to try no more nor less hard than they might if they were a user wanting to cross the portage for an enjoyable day. However, it is clear that the participants were very determined to succeed in the portaging, and a spirit of competition developed. Observers considered that much more effort was put forth than would reasonably be expected.

Finally, the tests were conducted over graded surfaces. Currently, the portages are maintained by the special-use permittees and the surface packed by the vehicles used to haul the boats. In the future, if the portages were closed to motorized means, we would expect that the surface will become more difficult, and, with respect to the grades on Prairie Portage in particular, more dangerous.

Individual Portage Findings:

Trout Lake Portage

This portage is located between Lake Vermilion and Trout Lake and consists of a roadbed approximately one half mile in length. There is a 30 foot rise in elevation from water level to the highest point on the portage. Nine of twelve parties

were able to complete the portage in both directions; however, those with light to medium loads had a much easier time of it. The two heavy load parties (a two and three person team, respectively) were unable to complete the portage. On the rainy day, the two person team of the two medium load parties (the only parties participating that day) did not complete the portage because of the slippery conditions. Physiological testing was done on two participants in a two person team on a "hot day" (over 85 degrees); the physiological data indicated that the participants frequently went over their 80 percent heart-rate reserve; that is, they exceeded the level that is considered feasible by physiologists to sustain. The data also shows that persons of "normal" condition would have worked considerably harder than our test participants, and for most of the portage, would have worked at about the level of their 80 percent heart rate reserve; that is, they would have consistently worked harder than is considered feasible to sustain. The data suggests that a high-level power challenge as well as a cardiovascular endurance challenge were involved. The pattern of sustained high intensity activity shown by the data is usually seen in athletes engaged in rigorous team sports or shorter road races.

Prairie Portage

This portage is located between Sucker and Basswood Lakes. The one half mile long portage crosses a rocky hill with a 10-15 percent grade climbing directly out of Sucker Lake for 250 feet. It drops at a 10-12 percent grade for about 500 feet into Basswood Lake. Nine of twelve parties were able to complete the portage in both directions. Of the three parties that failed the portage test.. all failed at or near the water's edge. The data show a distinct breaking point between the light and medium loads and the heavy loads. Two of the three heavy loads (a one person and two person team, respectively) failed, as did a two person medium load team. The physiological data for the teams crossing this portage was similar to that of the Trout Lake Portage teams.

Four Mile Portage

This portage is located between Fall Lake and Basswood Lake. It is approximately four miles long. It is nearly level, with slopes of 0-3 percent alternating in a gentle fashion across the portage. Eight of ten parties successfully completed the portage. The two teams (a two and three person team, respectively) who did not complete the portage did so because they either were discouraged by the rain (two person team) or felt they would not continue in the rain if they were going fishing (three person team). There was no clear "breaking point" between group size and load size as was identifiable in the Trout Lake Portage test. The physiological data of participants in two and three person tests with light, medium, and heavy loads indicated that sustained cardiovascular endurance was generally required with intermittent extremely high levels of exertion. The frequency with which the 80 percent heart rate reserve of "normal" persons was exceeded varied, but the data indicates that in every scenario of party and load size, the 80 percent level would be exceeded. The effort required, however, was sustained cardiovascular endurance, with intermittently high levels of exertion. The sustained heart rates required by the sustained effort was likened to those shown in marathon events by recreational athletes. The data reflecting the high levels of exertion intermittently required on this portage are similar to responses reported for varsity sports like hockey and basketball.

Portage via Fall and Newton Lakes and Pipestone Bay

This route has been described as a feasible alternative to the Four Mile Portage by the appellants and in the legislative history (statement of Representative Burton, Congressional Record, October 14, 1978, at H 13438). Boaters can make three relatively short nonmotorized portages to reach Basswood Lake instead of the four miles overland from Fall Lake to Basswood Lake. However, motorized use of Newton Lake and Pipestone Bay would exceed the quota

limits established in the BWCA Wilderness Act if the use from Four Mile Portage were diverted to this area. Nonetheless, testing was done. Physiological data showed that the physical effort required while portaging was similar to that required for the Prairie and Trout Lake Portages.

Conclusion

Twenty six of thirty four attempts were successfully completed by these participants. However, in view of medical risks, I am unable to conclude that nonmotorized portages are thus "feasible."

The physiological report (Portage Report, Appendix G), prepared by John R. Keener, Ph.D., and Edmond F. Lundstrom, Ph.D., of the University of Minnesota and Ken Harkins of St. Mary's Medical Center provide the most convincing evidence to me of the effort required to cross these portages. The physiological report concluded that: 1. the participants were in excellent physical condition and had a fitness level which would be good or excellent for much younger individuals; 2. a high level of sustained physical effort was required and the data suggested that this level "would not normally be achievable by people who are in a `normal' physical condition for their age and gender; 3. "it appeared that the highest efforts were required at the most dangerous phases of the tasks;" and 4. "the level of effort required . . . is certainly beyond that which is considered safe and prudent. . . . ."

Other factors to keep in mind are that very determined, very fit, Forest Service personnel participated in the tests. We must recognize that most members of the general public, and thus many visitors to the BWCA Wilderness, will not be as determined or fit.

I therefore have reached the following conclusions:

The Trout Lake Portage requires "high level power

challenges in addition to a cardiovascular endurance challenge" (Portage Report, Appendix G). I am convinced that the health of persons of normal fitness would be put to considerable risk if required to haul their boats across this portage.

Like the Trout Lake Portage, Prairie Portage requires high level power challenges as well as challenges to cardiovascular endurance. Moreover, I believe that the steep grades, which would require the greatest effort, create dangerous situations. It is likely that boats will get away from persons working beyond physical capabilities, injuring party members or persons of other portaging parties. I conclude that nonmotorized portaging is not feasible.

While the Four Mile Portage does not require high physical exertion for sustained periods of time, and its level grade does not pose dangers of runaway boats, I conclude nonetheless that nonmotorized portaging is not feasible. The effort required to cross this portage is like a marathon, an activity that is beyond most people.

The alternate route via Fall and Newton Lakes and Pipestone Bay cannot absorb the traffic that currently uses the Four Mile Portage. Moreover, the effort required for that route is similar to the effort required for the Prairie and Trout Lake Portages which I have already concluded is too great for a finding of feasibility.

I believe that these tests were conducted as fairly and objectively as possible. If anything, the participants tried too hard to succeed. I appreciate that some members of the public believe that motorized boating should cease within the BWCA Wilderness, and that preventing motorized portages will cause the use of heavy boats and motors to drop on wilderness lakes. However, the statute allows boats with motors up to 25 horsepower on the lakes served by these portages, and motorized use of .he lakes is not in issue here. My duty with regard to these portages is a narrow one: to determine whether motorized means of transport across the

portages is feasible.

As my determination is a factual finding required by statute, and not a discretionary decision to which the National Environmental Policy Act applies. this is not an appealable decision under 36 CFR 217.

/s/ F. Dale Robertson
F. DALE ROBERTSON
Chief

Supreme Court, U.S.
FILED
MAY 19 1993
OFFICE OF THE CLERK

No. 92-1692

In The

Supreme Court of the United States

October Term, 1992

City of Ely; Conservationists With Common Sense, Inc.; F.B. Hubachek, Jr.; Wilderness Outfitters, Inc.,

Petitioners,

v.

Friends of the Boundary Waters Wilderness; Sierra Club; The Wilderness Society; Defenders of Wildlife; Wilderness Watch; Wilderness Inquiry; Minnesota Public Interest Research Group; Izaak Walton League of America, Inc.,

Private Respondents,

and

F. Dale Robertson, Chief of the United States Forest Service; Mike Espy, Secretary of Agriculture,

Federal Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PRIVATE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit correctly held that Section 4(g) of the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978), and the Wilderness Act, mandate an end to the use of trucks on certain portages in the Boundary Waters Canoe Area Wilderness if it is physically possible for portage users to reach the lakes served by the portages using nonmotorized means.

PARTIES

The petitioners (intervenor-defendants below) are the City of Ely, Minnesota, Conservationists with Common Sense, Inc., F.B. Hubachek, Jr., and Wilderness Outfitters, Inc.

The private respondents (plaintiffs below) are Friends of the Boundary Waters Wilderness, Sierra Club, The Wilderness Society, Defenders of Wildlife, Wilderness Watch, Wilderness Inquiry, Minnesota Public Interest Research Group, and Izaak Walton League of America, Inc.

The federal respondents (defendants below) are the Chief of the Forest Service, F. Dale Robertson, and the Secretary of Agriculture, Mike Espy.

The private respondents have no parent corporation or subsidiaries within the meaning of Supreme Court Rule 29.1.

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No. 92-1692

In The

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City of Ely; Conservationists With Common Sense, Inc.; F.B. Hubachek, Jr.; Wilderness Outfitters, Inc.,

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and

F. Dale Robertson, Chief of the United States Forest Service; Mike Espy, Secretary of Agriculture,

Federal Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PRIVATE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Friends of the Boundary Waters Wilderness, Sierra Club, The Wilderness Society, Defenders of

Wildlife, Wilderness Watch, Wilderness Inquiry, Minnesota Public Interest Research Group, and Izaak Walton League of America, Inc. (collectively "the Friends") submit this brief in opposition to petitioners' request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND ORDERS BELOW

The mandate of the court of appeals issued to the district court on February 19, 1993. The Friends moved for summary judgment before the district court. On April 9, 1993, the district court granted the Friends' motion in relevant part, and entered an order ending forthwith motorized use on the Prairie, Trout Lake, and Four Mile Portages. A copy of that order is reproduced in the appendix to this brief.

JURISDICTION

The Friends do not contest the jurisdictional statement in the petition by City of Ely, *et al.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves interpretation of the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92

Stat. 1649 (1978) ("BWCAW Act"), specifically Section 4(g), and the Wilderness Act, 16 U.S.C. §§ 1131-36.

At no time prior to the filing of City of Ely's petition with this Court has any issue involving the fifth amendment to the United States Constitution been raised or litigated in this action. No such issue is properly before this Court.

STATEMENT OF THE CASE

The court of appeals opinion accurately and fairly sets forth the history of the litigation and the prior administrative review process. *Friends of the Boundary Waters Wilderness v. Robertson*, 987 F.2d 1484, 1484-86 (8th Cir. 1992), reprinted in petitioners' appendix at 1a-5a.

SUMMARY OF ARGUMENT

The decision below was a routine instance of a court interpreting a statute. The court of appeals explicitly applied this Court's precedent in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), concluding that Congress in the BWCAW Act had expressly addressed the issue of motorized portages, and had made the determination that if nonmotorized means of portaging were available, trucks should not be used in a designated wilderness.[1] In light of the undisputed factual record that portage wheels – small wheelbarrow-like

[1] While petitioners claim that the Eighth Circuit's decision was "patently contrary to decisions of this Court and . . . other

devices – can be used to transport boats to the lakes served by the portages, the Eighth Circuit simply enforced Congress's will and reversed the district court's judgment refusing to enjoin the use of trucks on the portages.

The government has not sought review of the Eighth Circuit's decision. The portages are now closed to motorized use. In all likelihood, Section 4(g) of the BWCAW Act, regulating three small pieces of land in one northern Minnesota wilderness, will never again require judicial attention.

ARGUMENT

I. THE COURT BELOW PROPERLY APPLIED THE *CHEVRON* DOCTRINE TO THE INTERPRETATION OF THE BWCAW ACT

This case presents a routine application of this Court's *Chevron* precedent. The Eighth Circuit examined the statute at issue, determined that Congress had spoken to the question before it, and gave effect to that congressional intent. 978 F.2d at 1486, citing *Chevron*, 467 U.S. at 842-43.

In 1978 when Congress passed the BWCAW Act it specifically addressed the fate of five motorized portages in the wilderness. In a legislative compromise known as

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decisions of the Eighth Circuit," Petition at 3, petitioners identify no relevant case of this Court ignored by the Eighth Circuit, and identify no contrary Eighth Circuit precedent, as there is none.

the Dayton-Walls compromise, Congress in Section 4(d) of the Act permitted two portages (Beatty and Loon Falls Portages) to remain open to motorized use indefinitely, and in Section 4(g) ordered the Secretary of Agriculture to close the other three (those at issue here) in 1984, if it was "feasible" to use nonmotorized means to reach the lakes served by the trucks:

> Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to assist in the transport of boats across the [Prairie Portage, Four Mile Portage, and Trout Lake Portage] during the period ending January 1, 1984. *Following said date, unless the Secretary determines that there is no feasible nonmotorized means of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above.*

(Emphasis added.)

The administrative appeal process prior to this litigation established the one undisputed fact relevant to the case: that it is physically possible for fishermen to use nonmotorized portage wheels to haul their boats and gear to the lakes served by the portages.[2] The legal issue

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[2] Indeed, there has always been a quality of absurdity to any contention that portage wheels were not a feasible means of reaching the lakes served by the truck portages. For over 25 years the Forest Service has, by published regulation, authorized portage wheel use on the portages at issue. *See* 36 C.F.R. § 293.16(b)(1). The record below contains evidence of portage wheel use on the portages going back at least to the early 1960s. It is difficult to contend that the Forest Service would expressly

then became whether the ability to use portage wheels made it "feasible" to reach the lakes served by the truck portages, mandating an end to motorized use.

The Eighth Circuit looked to two decisions of this Court to determine that when Congress orders an agency to make a feasibility determination, the agency is given little discretion and is simply to determine whether a task is physically capable of being done. In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971), this Court held:

> [T]he requirement that there be no "feasible" alternative route admits of little administrative discretion. For this exemption to apply the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route.

In *American Textiles Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508-509 (1981), this Court held:

> The plain meaning of the word "feasible" supports respondents' interpretation of the statute. According to Webster's Third New International Dictionary of the English Language 831 (1976),

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draft, pass and maintain for 25 years regulations authorizing a nonfeasible form of transportation across the three portages.

The petitioners also greatly exaggerate the physical effort required to use portage wheels. One of the men the Friends had demonstrate portage wheel use was 66 years old at the time. A Forest Service test party composed entirely of senior citizens successfully crossed the portages using portage wheels. The record below shows that in all the years portage wheels have been used on the three portages, no injury has ever been reported.

> "feasible" means "capable of being done, executed, or effected." Accord, the Oxford English Dictionary 116 (1933) ("Capable of being done, accomplished or carried out"); Funk & Wagnalls New "Standard" Dictionary of the English Language 903 (1957) ("That may be done, performed or effected"). Thus, § 6(b)(5) [of the Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5)] directs the Secretary to issue the standard that "most adequately assures . . . that no employee will suffer material impairment of health," limited only by the extent to which this is "capable of being done. . . . "

While the court of appeals found the plain language of the statute dispositive in light of the *Overton Park* and *American Textiles* cases, the court's opinion does note that the legislative history of the Dayton-Walls compromise fully supports the interpretation of "feasible" as meaning simply "capable of being done." 978 F.2d at 1488. The Eighth Circuit's method of analyzing the BWCAW Act's legislative history, including the statements made by Representative Burton to his colleagues in his capacity as manager of the House Conference Committee, was fully consistent with precedent of this Court. *See, e.g., Brock v. Pierce County,* 476 U.S. 253 (1986).

In light of the congressional mandate that motorized use end if feasible nonmotorized means of access exist, the factual evidence that nonmotorized portage wheels are capable of being used on the portages at issue, and this Court's precedents, the Eighth Circuit took the only available course. It enforced the statute and reversed the district court's order refusing to enjoin continued motorized use on the portages. While that result was

displeasing to the petitioners, it was legally routine, and certainly not in conflict with any of this Court's decisions or any other lower federal court decisions.

II. NO ISSUE CONCERNING THE FIFTH AMENDMENT IS PROPERLY BEFORE THIS COURT

The claim that enforcing Section 4(g) of the BWCAW Act and terminating motorized use at Prairie, Trout Lake, and Four Mile Portages violates the fifth amendment has never previously been raised or preserved on appeal. This Court should not address it at this late date.

The argument is clearly meritless anyway. The portages themselves are all public land, part of the Superior National Forest. The truck concessions are operated under special use permits granted by the Forest Service. The Forest Service may terminate those special use permits. 36 C.F.R. § 251.60. There is also no reasonable basis on which to claim that Congress cannot direct an end to motorized activities in a wilderness previously authorized by special use permits. In any event, the remedy for a taking claim would be an action for compensation under the Tucker Act, 28 U.S.C. § 1491, not a voiding of Section 4(g) of the BWCAW Act.

CONCLUSION

For all of the reasons stated above, this Court should deny the Secretary's petition for a writ of certiorari.

May 1993

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-90-8

Friends of the Boundary Waters Wilderness, *et al.*	)	ORDER
v.	)	(Filed 4-9-93)
F. Dale Robertson as Chief of the United States Forest Service, *et al.*	)	

This matter is before the Court on plaintiffs' motion for summary judgment. This Court's decision, reported at 770 F.Supp. 1385, has been reversed on appeal. *See Friends of the Boundary Waters v. Robertson,* 978 F.2d 1484 (8th Cir. 1992), *reh'g and reh'g en banc denied* (1993). The mandate of the Court of Appeals was issued on February 19, 1993. On April 1, 1993, that Court denied a motion to recall the mandate, or for a stay.

Therefore, the plaintiffs' motion is granted in part, and denied in part. The Court will direct the Secretary of Agriculture to close the motorized portages, and remand this matter for further proceedings consistent with the now properly understood applicable law. *See e.g., N.L.R.B. v. Enterprise Ass'n of Pipefitters,* 429 U.S. 507, 523 n. 9 (1977); *County v. Dole,* 886 F.2d 147, 149 (8th Cir. 1989); *Pollgreen v. Morris,* 770 F.2d 1536, 1544-45 (11th Cir. 1985).

Based upon the files, records, and proceedings herein, and pursuant to 5 U.S.C. § 706, IT IS ORDERED that:

1. The Secretary of Agriculture shall, forthwith, terminate the operation of motorized portages from Sucker Lake to Basswood Lake (Prairie Portage), from Fall Lake to Basswood Lake (Four Mile Portage) and from Lake Vermillion to Trout Lake (Trout Lake Portage).

2. The matter is remanded to the Secretary of Agriculture who is directed to take those actions necessary to comply with the dictates of the Wilderness Act of 1964, as amended, 16 U.S.C. §1131, *et seq.*, the Boundary Waters Canoe Area Wilderness Act of 1978, P.L. 95-495, 92 stat. 1649, the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, and the National Forest Management Act, 16 U.S.C. § 1600.

3. Plaintiffs may submit a petition for costs, including attorneys' fees, within 30 days, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d). The defendants may be permitted to respond to the fee petition within 10 days thereafter. Any petition and response which are filed shall be directed to the United States Magistrate of this Court for report and recommendation, pursuant to 28 U.S.C. §636(b)(1)(B).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: April 9, 1993

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

MAY 17 1993
OFFICE OF THE CLERK

No. 92-1692

In The
Supreme Court of the United States
October Term, 1992

City of Ely, a Minnesota corporation, Conservationists With Common Sense, Inc. a Minnesota not-for profit corporation; F.B. Hubachek, Jr.; Wilderness Outfitters, Inc.,

Petitioner,

v.

Friends of the Boundary Waters Wilderness; Sierra Club; The Wilderness Society; Defenders of Wildlife; Wilderness Watch; Wilderness Inquiry; Minnesota Public Interest Research Group; Izaak Walton League of America, Inc., and F. Dale Robertson, Chief of the U.S. Forest Service; Edward Madigan, Secretary of Agriculture,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR JAMES L. OBERSTAR REPRESENTATIVE OF THE EIGHTH CONGRESSIONAL DISTRICT OF MINNESOTA AS AMICUS CURIAE SUPPORTING PETITIONERS

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May 13, 1993

QUESTIONS PRESENTED

1. May a Court interpret a statute which delegates authority to the Executive Branch in such a way as to deprive the Executive Branch of any discretion under the statute?

2. May a Court substitute its own definition of "feasible" irrespective of the text, context, and legislative history of the term in a particular statute?

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Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495 (1978) 1,2

I. INTEREST OF AMICUS CURIAE

Congressman James L. Oberstar is the Representative of the Eighth Congressional District of Minnesota. The Boundary Waters Canoe Area Wilderness (BWCAW) is located in the Superior National Forest, along the Canadian border, entirely within his Congressional district. Representative Oberstar actively participated in Congressional consideration of the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495 (1978).

II. STATEMENT OF THE CASE

The Amicus Curiae adopts the Petitioners' Statement of the Case.

III. SUMMARY OF ARGUMENT

I strongly urge the Supreme Court to hear the case, *City of Ely; Conservationists With Common Sense v. Friends of the Boundary Waters Wilderness and F. Dale Robertson, Chief of the U.S. Forest Service*, docket # 92-1692, concerning the motorized portages in the BWCAW. The Eighth Circuit Court of Appeals misinterpreted the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495 (1978); this decision needs to be reviewed.

IV. ARGUMENT

Section 4(g) of the Boundary Waters Canoe Area Wilderness Act Pub. L. No. 95-495 (1978) states:

> Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to assist in the transport of boats across the portages from Sucker Lake to Basswood Lake, from

> Fall Lake to Basswood Lake, and from Lake Vermillion to Trout Lake, during the period ending January 1, 1984. Following said date, unless the Secretary determines that there is no *feasible* nonmotorized means of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above. [emphasis added.]

The Act permits use of motorboats on the lakes mentioned in the above language and clearly intends for visitors to traverse boats across the portages by mechanized means. Congress did not prohibit, or intend to prohibit, motor boat use on lakes and make it impractical to transport the boats to the lakes that allow motorized use. The Act, therefore, first permits the operation of motorized transportation across the portages; then establishes a process by which the Secretary should determine whether there is an alternative for motorized means across the portages. It is erroneous for the Court of Appeals to interpret Congressional intent as allowing motor boat use on these lakes, but making it impractical to transport the boats to those lakes.

The law directed the Secretary to determine alternative "feasible" non-motorized means across the portages. The Court of Appeals' definition of feasible clearly is not the definition commonly understood by citizens or lawmakers when using that term. I was a Member of Congress throughout the period of consideration of this bill in committee and on the House floor. I can assure this Court that when the term feasibility was used, our understanding of the application of that term was a use that was practical, from the standpoint in which people normally conduct this activity.

The lower court created its own definition of the term feasibility, in effect, rewriting the law to substitute "possible" for feasible. These are two vastly different terms, whose applications

have vastly different results. I believe it is vitally important for the Supreme Court to hear this case and decide if the lower court's interpretation is appropriate, because over 1,200 Acts of Congress include the term feasible. The lower court's redefinition of commonly accepted usage will have far-reaching implications for hundreds of other Acts of Congress, and further, will influence the writing of future legislation where the term feasible might be included.

The lower court's definition departs from common practice, usage, and understanding of the term in plain, simple English. If the Supreme Court does not definitively resolve this issue, some 1,200 current laws will have to be re-evaluated. Surely, the Supreme Court cannot allow that result to occur.

The Eighth Circuit Court of Appeals principally considered one decision by the Supreme Court, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 402 U.S. 401 (1971), as the basis for its erroneous definition for the term "feasible." This case was totally irrelevant to the motorized portage case; one particular example may be feasible in one situation, but may not be feasible in another situation. Overton Park weighed the feasibility and "prudence" of "sound engineering" when routing a highway around a park rather than through it. Overton Park does not support the definition of the term feasible as possible.

Staff from the Superior National Forest and the University of Minnesota Department of Physical Medicine joined in an exhaustive on-site demonstration in which series of tests were conducted to discern feasible methods for distinct population groups to move boats across Prairie Portage, Four Mile Portage, and Trout Lake Portage. The Forest Service concluded on the basis of these demonstrations that the only feasible method to transport the boats was by motorized means.

The series of tests to determine the feasibility of non-motorized means to traverse these portages, which the Forest

Service undertook, were comprehensive and completely open. The Forest Service conducted these tests under a variety of weather conditions and with a diverse group of participants representing a wide range of age and physical abilities. The tests were performed in the open, before the public eye, and were videotaped. The results and the videotapes were also made available to interested parties on both sides of the issue.

If the Forest Service is to be faulted for its efforts, then there is no limit to the number of Forest Service policies which can be subject to dismissal in keeping with the Circuit Court's ill-considered decision, as will comparable actions under the 1,200 federal laws that use the term feasible.

The Circuit Court's decision was nothing less than a summary rejection of a fair, open, and objective demonstration by the Forest Service. The resolution of this matter should not be allowed to end at the Eighth Circuit, which reversed a decision by the District Court by using an unusual interpretation of the term feasible. The Forest Service did not act in an arbitrary or capricious manner when coming to its decision. Rather, the Forest Service solicited the participation of skilled professionals, medical experts, and a wide range of citizens who are characteristic of those who use the BWCAW for recreational purposes. These tests could not have been more fair, objective and open. The tests demonstrated beyond a reasonable doubt that there is no practical feasible alternative to motorized assistance at these portages.

I also urge the Supreme Court to consider the severe adverse effect the Circuit Court's decision to terminate mechanized use of these portages will have on the local economy in northeastern Minnesota, closing off a source of income for outfitters and resorters, whose livelihoods depend on this activity. Additionally, the closure will virtually eliminate BWCAW access to the handicapped, elderly and families with young children. It will preserve the BWCAW for only the young and the strong.

Such far-reaching consequences should not rest with the decision of the Circuit Court; they should be considered by the highest court in the land.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed or in the alternative, the Petition should be granted and this case set for plenary consideration by the United States Supreme Court.

City of Ely;
Conservationists With Common Sense;
Amicus Curiae.

Respectfully submitted,

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May 13, 1993

Supreme Court, U.S.
FILED
MAY 17 1993
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No. 92-1692

In The

Supreme Court of the United States

October Term, 1992

CITY OF ELY, CONSERVATIONISTS WITH COMMON SENSE, INC.; F.B. HUBACHEK, JR.; WILDERNESS OUTFITTERS, INC.,

Petitioners,

v.

FRIENDS OF THE BOUNDARY WATERS WILDERNESS: SIERRA CLUB; THE WILDERNESS SOCIETY; DEFENDERS OF WILDLIFE: WILDERNESS WATCH; WILDERNESS INQUIRY; MINNESOTA PUBLIC INTEREST RESEARCH GROUP; IZAAK WALTON LEAGUE OF AMERICA, INC.,

Private Respondents,

and

F. DALE ROBERTSON, CHIEF OF THE UNITED STATES FOREST SERVICE; MIKE ESPY, SECRETARY OF AGRICULTURE,

Federal Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONERS, WILDERNESS OUTFITTERS, INC. and F.B. HUBACHEK, JR., TO PRIVATE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PREFACE

The fact that the government has not sought review of the Circuit Court's decision (Private Respondents' brief, p.4) is irrelevant to the issue of certiorari. Presumably, these Petitioners (Intervenors) are entitled to as much consideration as the government which must determine whether or not to petition for certiorari in literally hundreds of cases.

Private Respondents state (p.4) that the portages are now closed to motorized use. Despite the Private Respondents' strenuous efforts to have the portages torn up so even portage wheel use would have been impossible, these Petitioners believe that a Native American family of Ely may have continuing rights of motorized use of the Four-Mile Portage by deed and that a scientific research foundation also has such rights until 1995. These deed rights are of public record.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING "FEASIBLE" TO MEAN "PHYSICALLY POSSIBLE" (OP. 7,8)

Neither *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) nor *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490 (1981) supports the Court of Appeals' cramped definition of "feasible." This Court has never held that "feasible" means possible as a matter of law with no room for administrative construction. The Court of Appeals' decision not only holds that

"feasible" means "possible", but that the ability of strong rangers to accomplish a non-motorized portage is sufficient to satisfy the BWCAW Act. It may be *possible* to push a boat with a 25 hp motor across the Grand Portage from Lake Superior to the border lakes, some 25 miles, as this portage was done by the voyageurs with large canoes and heavy packs of furs and supplies. It is, however, scarcely feasible as that term is commonly understood.[1] Private Respondents refer to "a quality of absurdity" (fn.2,p.5) to the contention that portage wheels are not a feasible means of portaging heavy motorboards for up to four miles. The administrative findings and video-taped results are to the contrary. Indeed, what is absurd is the Private Respondents' assertion that Congress intended to permit motors on the lakes on each end of these portages, but to deny them as a matter of law on the portages.

A glaring error of the majority opinion of the Circuit is its reliance on selected portions of the legislative history. The intent of Congress as a whole is ignored and the statement of one Representative who was opposed to motorized use is substituted. If Congress had intended to terminate these portages, as Congressman Burton indicated, it would have done so directly and not left the

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[1] In Footnote 1, pp. 3-4, Private Respondents state that "Petitioners identify no relevant case of this Court ignored by the Eighth Circuit and identify no contrary Eighth Circuit precedent, as there are none." Petitioners submit that the Eighth Circuit decision is contrary to *Chevron*, misapplies *Overton Park*, and is also contrary to *Voyageurs Region National Park Association v. Lujan*, 966 F.2d 424 (8th Cir. 1992), holding that general provisions of the Wilderness Act must give way to the more specific provisions of the statute. 966 F.2d at 428.

determination to the Secretary. If the Congress meant "possible", it would have used that word, not "feasible."

II. THE ISSUE IS OF IMPORTANCE NOT ONLY TO PROSPECTIVE USERS OF THE AREA, BUT ALSO IN ADMINISTRATIVE DETERMINATION OF QUESTIONS PURSUANT TO *CHEVRON*

These three portages are used by 13,000 visitors annually and thousands more are prospective users. The majority of these people, those not in the 90th percentile of physical fitness including almost all elderly and handicapped people, will be forever barred from enjoying this prime wilderness and fishing area. Thousands more resort owners and merchants in and around Ely, Minnesota, will suffer financially from the closing of this small portion of the wilderness yet available for public motorboat use.

Private Respondents attempt (p.4) to denigrate the importance of this case by referring to the Act "regulating three small pieces of land in one northern Minnesota wilderness" which they assert will never again require judicial attention. The Private Respondents are special interest groups who have a personal desire to enjoy Basswood and Trout Lakes (as well as the thousands of other lakes in the wilderness area) with canoes only, despite the fact that Congress has specifically authorized the use of motorboats on these two lakes. The interest of these Private Respondents should not be construed to be environmental.

However, there is a greater importance to the case than that involving the use of these three portages. The

Court of Appeals effectually avoided the doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) by its finding. If this case is permitted to stand, it will permit result-oriented courts to avoid the finding of an administrative agency mandated by Congress and supported by substantial evidence.

In addition, as Congressman Oberstar pointed out in his *amicus curiae* brief, there are some 1,200 statutes which use the term "feasible" and thus defining "feasible" as meaning "possible" in all circumstances has far reaching consequences.

CONCLUSION

The Private Respondents' assertion (p.7) that the Eighth Circuit "took the only available course" is clearly erroneous in view of the dissent of Judge Magill and the decision of the District Court. Two out of the four Judges who have written opinions on this question have adopted the position of the Petitioners (Intervenors), which is a compelling reason why this Court should accept jurisdiction.

May 1993

Respectfully submitted,

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(5)

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No. 92-1692

In the Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF ELY, ET AL., PETITIONERS

v.

FRIENDS OF THE BOUNDARY WATERS WILDERNESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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9 pp

QUESTION PRESENTED

Whether the court of appeals erred by concluding that the term "feasible" in Section 4(g) of the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1651 (1978), means "physically possible."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 978 F.2d 1484. The decision of the district court (Pet. App. 21a-37a) is reported at 770 F. Supp. 1385.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1992. A petition for rehearing was denied on January 26, 1993. Pet. App. C, 37a. The petition for a writ of certiorari was filed on April 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the Forest Service's decision to permit the continued use of motor vehicles to transport boats over three strips of land in the Boundary Waters Canoe Area Wilderness (BWCAW), which lies within the Superior National Forest in Northern Minnesota. Two of the three strips of land in question—the "Prairie Portage" and the "Trout Lake Portage"—are each about one half-mile long, while the "Four Mile Portage" is four miles long. Pet. App. 2a-3a. In 1978, Congress enacted the Boundary Waters Canoe Area Wilderness Act. Section 4(g) of that Act directed the Secretary of Agriculture to close the three motorized portages on January 1, 1984, "unless the Secretary determines that there is no feasible nonmotorized means of transporting boats across the portages to reach the lakes previously served by the portages." Act of Oct. 21, 1978, Pub. L. No. 95-495, § 4(g), 92 Stat. 1651.

The Chief of the Forest Service ultimately determined that there is no feasible alternative to motorized portaging. Pet. App. 56a. That decision followed testing of nonmotorized portaging on the three strips of land by a dozen teams consisting of persons in above-average physical condition. Although most of the participants "were above the 90th percentile of fitness" and "a spirit of competition developed" between the teams, *id.* at 60a, about one-quarter of the attempts to transport boats across the portages without motorized assistance failed, *id.* at 60a-62a. The report prepared by the physiologists who monitored the testing concluded that the level of effort required to transport boats without motorized

assistance "is certainly beyond that which is considered safe and prudent." *Id.* at 63a (quotation marks omitted). After reviewing that report, the Chief determined that nonmotorized portaging was not feasible for average visitors to the Boundary Waters Canoe Area Wilderness because "there is [a] considerable risk to their health and safety." *Id.* at 59a.

2. The respondents—various environmental organizations—brought suit challenging the final decision of the Chief of the Forest Service. They argued that so long as some people are physically able to transport their boats across the portages without motorized assistance, nonmotorized portaging is "feasible" within the meaning of Section 4(g) of the Boundary Waters Canoe Area Wilderness Act. The district court granted summary judgment in favor of the government after concluding that the term "feasible" is ambiguous and that the Forest Service had provided "a permissible construction of the BWCAW Act." Pet. App. 36a.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-12a. It held that "feasible" in Section 4(g) "means 'capable of being done' or 'physically possible.'" Pet. App. 9a. Since the Forest Service's test showed that some persons could transport boats across the portages without motorized assistance, the court held that nonmotorized portaging is "feasible" on the three strips of land at issue because it is "physically possible." See *id.* at 4a-5a, 6a.

Judge Magill dissented. Pet. App. 13a-20a. In his view, the meaning of "feasible" is not clear from the Act or its legislative history, and the court therefore should "defer to the Forest Service's reasonable decision." Pet. App. 20a.

Both petitioners and the government sought rehearing and rehearing en banc. The Eighth Circuit denied those petitions, with four judges dissenting. Pet. App. C, 37a.

ARGUMENT

Although we believe the court of appeals erred, we do not believe review by this Court is warranted, because the court's error is limited in its effect.

As an initial matter, we agree with petitioners that the Eighth Circuit erred in holding that the word "feasible" as used in Section 4(g) of the Boundary Waters Canoe Area Wilderness Act necessarily means "physically possible." As the court of appeals recognized, "feasible" may also mean "reasonably possible," Pet. App. 7a, and that is the interpretation the Secretary employed here. As the statutory language indicates (and as the legislative history of the Act confirms), Congress could not reach agreement concerning whether the three motorized portages at issue should be closed, so it directed the Secretary of Agriculture to determine whether nonmotorized portaging is "feasible." At the Secretary's direction, the Chief of the Forest Service reasonably determined that nonmotorized portaging is not "feasible," because one-quarter of a group of exceptionally fit teams could not accomplish the task. As Judge Magill concluded in dissent, the court should have deferred to the Chief's interpretation and application of Section 4(g). See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Nevertheless, review by this Court is not warranted. The question presented concerns the interpretation of one word in one Act that affects one

wilderness area lying entirely within one regional circuit. Thus, this case involves the first, last, and only appellate interpretation of the word "feasible" as that word is used in Section 4(g) of the Boundary Waters Canoe Area Wilderness Act. Contrary to petitioners' contention (Reply Br. 4), we do not think that the court of appeals held that, under *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), "feasible" means "physically possible" each time it appears in the United States Code. Rather, the court of appeals stressed that "Section 4(g) requires termination of motorized use of the portages unless the Secretary determines that there is no feasible motorized means of transporting boats across the portages," Pet. App. 8a, and held that, in light of the wilderness purposes to which the Act requires the land to be put, "feasible" should be given a narrow reading in Section 4(g). Similarly, the court of appeals did not decline to follow *Chevron*; it simply misapplied *Chevron* by concluding "that 'Congress has directly spoken to the precise question' at issue." Pet. App. 8a (quoting *Chevron*, 467 U.S. at 842).

Finally, while we disagree with the court's conclusion that "feasible" should be construed narrowly, we do not agree with petitioners' contention that "feasible" must be given a broader meaning so as to avoid a construction of Section 4(g) that would, in petitioner's view, effect an uncompensated taking of the property of the motorized portaging operators or of other vendors in the Boundary Waters Canoe Area Wilderness. Petitioners did not present a taking argument in the court of appeals. Moreover, any claim that there has been an uncompensated taking would be completely lacking in merit. We know of no

case—and petitioners have cited none—suggesting that the businesses operating in the Boundary Waters Canoe Area Wilderness have a property right protected by the Fifth Amendment to have the government continue to allow motorized transportation across public land in those wilderness surroundings. Petitioners' belated invocation of the Fifth Amendment therefore does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-1692

In The

Supreme Court of the United States

October Term, 1992

CITY OF ELY, CONSERVATIONISTS WITH COMMON SENSE, INC.; F.B. HUBACHEK, JR.; WILDERNESS OUTFITTERS, INC.,

Petitioners,

v.

FRIENDS OF THE BOUNDARY WATERS WILDERNESS, et al.,

Private Respondents,

and

F. DALE ROBERTSON, CHIEF OF THE UNITED STATES FOREST SERVICE; MIKE ESPY, SECRETARY OF AGRICULTURE,

Federal Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY OF PETITIONERS, F.B. HUBACHEK, JR. and WILDERNESS OUTFITTERS, INC., TO BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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These Petitioners respectfully submit that it is inappropriate for the Federal Respondents to oppose the Petition For Writ of Certiorari in this instance. The Federal Respondents admit that the Eighth Circuit erred in its construction of the word "feasible" in the Boundary Waters Canoe Area Wilderness Act. The decision is not limited to one geographical area and a mere 13,000 people. It affects every person in the United States who wishes to use the Boundary Waters Canoe Area Wilderness and, particularly, all persons over middle age or with any handicap whatsoever. In addition, the decision does point the way for other courts to avoid the doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This argument is valid whether or not this Court considers the Fifth Amendment taking argument. However, the Petitioners merely pointed out a rule of construction; do not adopt an unconstitutional construction of a statute where another reasonable and constitutional construction is possible.

The Petitioners should not be bound by the Federal Respondents' priorities and this Court should not be influenced by what the Justice Department believes is important. An act of Congress permitting small outboard motors on the two lakes has been effectually amended. *Chevron* has been avoided and any result-oriented court which desires to do so can follow the path of the Eighth Circuit and interpret the law to secure the desired result. Frankly, these Petitioners are shocked by the casual attitude of the Federal Respondents that the decision is wrong but it is not important enough (to the Justice Department) to bother with. Any palpable injustice is worth correcting, and one involving a federal statute, a

federal agency and federal lands, as well as affecting administrative law, thousands of people and a regional economy, is worth correcting by the Supreme Court, notwithstanding its crowded docket. Certiorari should not be denied because of some perceived quota of certiorari petitions to be supported by Justice. The Required Statement For Rehearing *En Banc* filed in the Eighth Circuit on Petition For Rehearing by the attorney of record for the Federal Appellees is attached as an addendum.

In that instance the Federal Appellees certified that the appeal raised questions of "exceptional importance" and these Petitioners respectfully submit that they remain of extreme importance, not only to the area but to the federal administrative agencies and the nation.

These Petitioners sincerely believe that the plaintiffs, including the Sierra Club, The Wilderness Society and the Izaak Walton League and environmental groups with hundreds of thousands of members unconsciously influenced the Court of Appeals with non-existent and impermissible environmental considerations. The plain legal error of the Circuit Court is an injustice which should be corrected.

Respectfully submitted,

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ADDENDUM

REQUIRED STATEMENT FOR REHEARING *EN BANC*
(8th Cir. R. 35A(c)(2))

I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Voyageurs Region National Park Association v. Lujan,* 966 F.2d 424 (8th Cir. 1992); *Chevron U.S.A. v. Natural Resources Defense Council,* 647 U.S. 402 (1971); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971); *Garcia v. United States,* 469 U.S. 70, 76 (1984).

I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

1) whether the word 'feasible' is defined as a matter of law to mean 'physically possible'; and

2) whether this Court should reverse a district court and an administrative determination that permitted the continued operation of three motorized portages in the Boundary Waters Canoe Area Wilderness, a decision that affects approximately 13,000 visitors to the Boundary Waters.

Peter A. Appel
Attorney of Record for
Federal Appellees